No. 80-11, No. 80-15
(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. Gregory Merrion and Robert L. Bayless,
d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE
TRIBAL COUNCIL, AND CECIL ANDRUS,
SECRETARY OF THE INTERIOR, et al.,
Respondents,

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL., AND
CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

JOINT APPENDIX

JASON W. KELLAHIN
P.O. Box 1769
Santa Fe, New Mexico
87501
Telephone (505) 982-4285

BRUCE DOUGLAS BLACK
P.O. Box 2208
Santa Fe, New Mexico 87501
Telephone (505) 988-4421

Counsel for Petitioners
No. 80-11

JOHN R. COONEY
Mark B. Thompson, III
P.O. Box 2168
Albuquerque, New Mexico
87103
Telephone (505) 243-4511

JOHN H. PICKERING
SAMUEL A. STERN
1666 K Street, N.W.
Washington, D.C. 20006
Telephone (202) 872-6000

Counsel for Petitioners
No. 80-15

(Counsel List Continued Inside)

PETITION FOR CERTIORARI FILED:
No. 80-11, July 3, 1980
No. 80-15, July 5, 1980

CASES CONSOLIDATED AND CERTIORARI GRANTED
OCTOBER 6, 1980

Counsel No. 80-11
THOMAS H. BURTON
JOHN WIMBISH
P. O. Box 2197
Houston, Texas 77001
Telephone (713) 965-1030
(713) 965-1100

Of Counsel No. 80-15
R. H. LANDT
Amoco Building
17th & Broadway
Denver, Colorado 80202

RICHARD MARLAR
Marathon Oil Company
Findlay, Ohio 45840

ROBERT J. NORDHAUS
200 Lomas Boulevard
N.W.
Suite 810
Albuquerque, New Mexico
87102
Telephone (505) 243-4275

TERRY D. FARMER
200 Lomas Boulevard
N.W.
Suite 800
Albuquerque, New Mexico
87102
Telephone (505) 843-9440

Counsel for Respondents
JICARILLA APACHE TRIBE, ET AL.

WADE H. MCCREE, JR.
Solicitor General
LOUIS F. CLAIBORNE
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530
Telephone (202) 633-2217

Counsel for Respondent Cecil Andrus,
Secretary of the Interior

No. 80-11, No. 80-15
Consolidated

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the Interior, et al.,

Respondents,

AMOCO PRODUCTION COMPANY and MARATHON OIL COMPANY,

Petitioners,

v.

JICARILLA APACHE TRIBE, et al., and CECIL ANDRUS, Secretary of the Interior,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

INDEX

	PAGE
Chronological List of Relevant Docket Entries	i
Complaint of J. Gregory Merrion, et al., No. 77-292-P, U.S. District Court, New Mexico	1
Complaint of Amoco Production Company, et al., No. 77-343-P, U.S. District Court, New Mexico	43
Answer, Jicarilla Apache Tribe, et al., Case No. 77-292-P. (Merrion)	67
Answer, Jicarilla Apache Tribe, et al., Case No. 77-343-P. (Amoco)	75
Order to Consolidate Cases 77-292-P, Civil, and 77-343-P, Civil	87
Pre-Trial Order in Consolidated Cases	89
Answer of Cecil Andrus in No. 77-292-P, U.S. District Court, New Mexico	107
Answer of Cecil Andrus in No. 77-343-P, U.S. District Court, New Mexico	113
Motion for Leave to amend answer and For a Rehearing on Certain Issues and Amendment of answer of Jicarilla Apache Tribe, et el., Case No. 77-343-P.*	119
Order denying motion to amend Answer and rehearing on certain issues	125
Court's Findings of Fact and Conclusions of Law	127
Judgment, U.S. District Court, New Mexico	135
Order of Dismissal	137
Opinion of the United States Court of Appeals for the Tenth Circuit (as amended), decided February 22, 1980	139
Order, Court of Appeals for the Tenth Circuit amending Opinion and denying rehearing	199
Orders, Supreme Court of the United States consolidating 80-11 and 80-15, and granting certiorari	203

* A similar amendment of answer was filed in Case No. 77-292-P.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

LIST OF RELEVANT DOCKET ENTRIES

	Docket Entry Number	Date	Description of Docket Entry
	*		PRIOR TO CONSOLIDATION, REFERENCES ARE TO DOCKET ENTRY NUMBERS IN NO. 77-292P UNLESS OTHERWISE INDICATED.
	1	5/23/77	Complaint of Merrion, et al., with exhibits attached, filed in U.S. District Court, District of New Mexico.
	2	5/23/77	Motion for Preliminary Injunction.
343P	1	6/14/77	Complaint of Amoco Production Company, et al., with exhibits attached, filed in U.S. District Court, District of New Mexico.
343P	2	6/14/77	Motion for Preliminary Injunction by Plaintiffs.
343P	4	6/14/77	Application for Temporary Restraining Order by Plaintiffs with Affidavit in support attached.
		6/17/77	Hearing Re: Preliminary Injunction in Nos. 77-292P and 77-343P.
	31	7/ 1/77	Answer of Jicarilla Apache Tribe and Jicarilla Tribal Council, Case No. 77-292.
	43	7/ 5/77	Motion to Dismiss Suit or to Dismiss Preliminary Injunction by Defendant Jicarilla Apache Tribe.
	45	7/ 6/77	Court's Findings of Fact and Conclusions of Law (Payne), U.S. District Court, New Mexico.
	46	7/ 6/77	Preliminary Injunction that Defendants, agents, etc., are restrained and enjoined pending full determination of action from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of Plaintiffs; provided Plaintiffs first give security in amount of estimated three months' tax liability such bond to be approved by the Clerk of the Court no later than 7/6/77. (Payne).

	Docket Entry Number	Date	Description of Docket Entry
343P	22	7/ 6/77	Preliminary Injunction against Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde restraining them from collecting and enforcing the Jicarilla Oil and Gas Serverance Tax against the Plaintiffs provided that Plaintiffs give a bond in an amount equal to three months payment of the tax to cover costs and damages if Defendants shall be found to have been wrongfully enjoined, pending the determination of this action or until further order of this court. (Payne) Copies mailed to counsel.
	56	7/12/77	Motion for Rehearing by Defendant Jicarilla Apache Tribe.
343P	32	7/21/77	Answer by Defendants, Jicarilla Apache Tribe, Jicarilla Tribal Council, and Gwendolyn Velarde containing affirmative defenses, Case No. 77-343-P.
	87	8/ 3/77	Order granting leave to intervene to Mobil Oil Corp., and Oxy Petroleum, Inc., and to adopt allegations and prayers contained in Complaint of Plaintiffs' and in Motions filed by Plaintiffs; that proceedings taken in action shall be effective for and against Mobil Oil Corp., and Oxy Petroleum, Inc., and each are made parties plaintiff to action by this Order, upon each posting bond in amount of three months' estimated tax under Jicarilla Tribe Ordinance No. 77-0-02 as ordered. (Payne)
	88	8/ 3/77	Order to Consolidate Causes 77-292P and 77-343P (Payne)
		8/ 5/77	Pretrial Conference
	114	8/19/77	Pretrial Order (Payne)
	115	8/19/77	Answer by Defendants Jicarilla Apache Tribe and Jicarilla Tribal Council, to Complaint in Intervention, containing affirmative defenses.

Docket Entry Number	Date	Description of Docket Entry
126	8/24/77	Answer by Defendant Cecil Andrus, Secretary of Interior Re: 77-343P
127	8/24/77	Answer by Defendant Cecil Andrus, Secretary of Interior Re: 77-292P
128	8/25/77	Order that Defendants' Motion for a Rehearing of Preliminary Injunction and Defendants' Motion to Dissolve Preliminary Injunction are denied (Payne)
	8/29/77	Non-Jury Trial
194	10/21/77	Proposed Amendment of Answer of Jicarilla Apache Tribe and Jicarilla Apache Tribal Council in No. 77-292P.
195	10/21/77	Motion for Leave by Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council to Amend Answer and Rehearing on certain issues.
197	10/21/77	Proposed Amendment of Answer of Defendant Jicarilla Apache Tribe and Jicarilla Apache Tribal Council to Complaint in Intervention.
198	10/21/77	Proposed Amendment of Answer of Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde in No. 77-343P.
246	12/21/77	Order that the Defendants' Motion for Leave to Amend and for a Rehearing on certain issues is denied (Payne)
253	12/29/77	Court's Findings of Fact and Conclusions of Law.
254	12/29/77	Judgment that Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid, and void, that Permanent Injunction is issued and Defendants, their agents, servants, employees, and attorneys and all persons in active concert and participation with Defendants are restrained and enjoined from taking action to enforce or collect Jicarilla Apache Oil and Gas Severance Tax that Plaintiffs and Intervenors recover their costs to be taxed by Clerk of Court (Payne)

Docket Entry Number	Date	Description of Docket Entry
278	1/30/78	Notice of Appeal by Defendant Jicarilla Apache Tribe, of Order entered 12/29/77.
286	3/28/78	Notice of Appeal by Secretary of the Interior.
293	5/22/78	Order Dismissing Complaint in No. 343-P as against Antonio Martinez, Executive Secretary New Mexico Oil and Gas Accounting Commission, with leave to refile in event of final judgment adverse to Plaintiffs.

COMPLAINT OF
J. GREGORY MERRION, ET AL.,
NO. 77-292-P, U. S. DISTRICT COURT,
NEW MEXICO

No. 77-292-P

In The

United States District Court

For The District of New Mexico

J. Gregory Merrion and Robert L. Bayless,
d/b/a Merrion and Bayless, Jerome T. McHugh,
Chase Oil Company, a New Mexico Corporation,
Dugan Production Corporation, a New Mexico Corporation,
Consolidated Oil and Gas, Inc., a Colorado Corporation,
Southland Royalty Company, a Delaware Corporation,
Tesoro Petroleum Corporation, a Delaware Corporation,
Amerada Hess, a Delaware Corporation,
Supron Energy Corporation, a Delaware Corporation,
Energy Reserves Group, Inc., a Delaware Corporation,
J. M. Huber Corporation, a New Jersey Corporation,
Continental Oil Company, a Delaware Corporation,
Atlantic Richfield Company, a Pennsylvania Corporation,
Phillips Petroleum Company, a Delaware Corporation,
Tenneco Oil Company, a Delaware Corporation,
Getty Oil Company, a Delaware Corporation,
and Gulf Oil Corporation, a Pennsylvania Corporation,

Plaintiffs,

v.

Jicarilla Apache Tribe, Jicarilla Apache
Tribal Council and Cecil Andrus,
Secretary of the Interior,

Defendants.

COMPLAINT

(Filed May 23, 1977)

Come Now Plaintiffs, by and through their attorneys, and for their Complaint against the Defendants state:

First Cause of Action

1. J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, are residents of the State of New Mexico.

2. JEROME T. MCHUGH is a resident of the State of New Mexico.

3. CHASE OIL COMPANY is a New Mexico Corporation with its principal place of business in New Mexico.

4. DUGAN PRODUCTION CORPORATION is a New Mexico Corporation with its principal place of business in New Mexico.

5. CONSOLIDATED OIL AND GAS, INC. is a Colorado Corporation with its principal place of business in Colorado.

6. SOUTHLAND ROYALTY COMPANY, formerly Aztec Oil and Gas is a Delaware Corporation with its principal place of business in the State of Texas.

7. TESORO PETROLEUM CORPORATION is a Delaware Corporation with its principal place of business in the State of Texas.

8. AMERADA HESS is a Delaware Corporation with its principal place of business in the State of New York.

9. SUPRON ENERGY CORPORATION, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. ENERGY RESERVES GROUP, INC. is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. HUBER CORPORATION is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. CONTINENTAL OIL COMPANY is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. ATLANTIC RICHFIELD COMPANY is a Pennsylvania Corporation located within the State of California.

14. PHILLIPS PETROLEUM COMPANY is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. TENNECO OIL COMPANY is a Delaware Corporation with its principal place of business located within the State of Texas.

16. GETTY OIL COMPANY is a Delaware Corporation with its principal place of business located in California.

17. GULF OIL CORPORATION is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Defendant, JICARILLA APACHE TRIBE, (hereinafter referred to as the "Tribe") is an Indian Tribe organized pursuant to 25 U.S.C. § 476-477, residing on an Executive Order Indian reservation within the State of New Mexico.

19. The legislative powers of the Jicarilla Apache Tribe reside in the Defendant, JICARILLA APACHE TRIBAL COUNCIL, (hereinafter "Tribal Council").

20. The Defendant, CECIL ANDRUS, is the Secretary of the Interior of the United States of America.

21. The matter in controversy exceeds the sum of Ten Thousand ($10,000) Dollars exclusive of interest and costs.

22. This action arises under Article I, Section 8, Clause 3 of the United States Constitution; the Fifth Amendment to the United States Constitution; 25 U.S.C. § 398(c); and 5 U.S.C. § 706, all as more fully appears hereinafter. Federal question jurisdiction is thus conferred on this Court by 28 U.S.C. § 1331.

23. The Tribe is now and has been at all pertinent times the beneficial owner of the royalty interest created by oil and gas leases on its Executive Order reservation lands which were sold

by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 398 and 25 U.S.C. § 396.

24. The contract numbers and property descriptions contained in the oil and gas leases referred to in Paragraph 22 above are included in Exhibit "A", attached hereto and incorporated herein by reference. A copy of the lease form typically used is attached hereto and made a part hereof as Exhibit "B".

25. On or about November 22, 1968, the Tribe, without lawful authority or procedure, adopted a "Revised Constitution," which reads in relevant part:

> "The Tribal Council may levy and collect taxes and fees on Tribal members, and may enact ordinances subject to approval by the Secretary of Interior, to impose taxes and fees on non-members of the Tribe doing business on the reservation."

26. On information and belief the Amended Constitution adopted by the Tribe on December 23, 1968 was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969 without hearing or due consideration.

27. On or about July 9, 1976 the Tribal Council, without lawful authority, adopted Ordinance No. 77-0-02, as amended to levy an oil and gas severance tax of five cents per million British Thermal Units (BTU) of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation and twenty-nine cents per barrel on crude oil or condensate produced on the Reservation and sold or transported off the Reservation. A copy of said Ordinance is attached hereto and made a part hereof as Exhibit "C", and referred to hereinafter as the Jicarilla Oil and Gas Severance Tax.

28. On information and belief the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit "C", was approved by the Secretary of the Interior of the United States on or about December 23, 1976 without hearing or due consideration.

29. Along with the copy of the Ordinance attached hereto as Exhibit "C" the Jicarilla Apache tribe served upon each of the Plaintiffs a copy of instructions on the applicability and procedural requirements of the Jicarilla Oil and Gas Severance Tax contained in Exhibit "C". Said instructions are attached hereto and made a part hereof as Exhibit "D". Under instructions contained in Exhibit "D", Plaintiffs are ordered to submit "initial operator's report remittance forms" within forty-five days after April 30, 1977. The instructions attached hereto as Exhibit "D" further provide that "initial tax remittances are also due at that time."

30. Plaintiffs would be irreparably harmed by having to pay such tax under protest in that they would have to pass such tax on to their customers and attempt to recover the tax from the Tribe. There is no guarantee under the Jicarilla Oil and Gas Severance Tax that any Jicarilla Tax assessments paid by the Plaintiffs under protest would be returned. To the contrary, Paragraph 11 of the Jicarilla Oil and Gas Severance Tax specifically provides:

> "Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of a credit against future tax payments."

31. Plaintiffs have no plain, speedy and adequate remedy at law.

32. In so adopting, approving, and undertaking the implementation of the severance tax ordinance attached hereto as Exhibit "C" without notice to, or an opportunity for a hearing by, the Plaintiffs, the Defendants have denied the Plaintiffs the *due process of law* guaranteed them by *Fifth Amendment* to the United States Constitution and the *Indian Civil Rights Act*, 25 U.S.C. § 1301, *et seq.*, and Article II, Section 18 of the *New Mexico Constitution.*

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any

action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

Second Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the first Cause of Action by reference as though fully stated herein.

2. The Jicarilla Oil and Gas Severance Tax embodied in Exhibit "C" applies only to oil and gas "produced on the Jicarilla Apache Reservation" and thus imposes a discriminatory tax upon Plaintiffs, not imposed upon oil and gas produced from similarly situated land held in trust by the federal government or similarly situated land in the San Juan Basin, a well-defined and well known producing area of oil and gas in northwest New Mexico, and such tax thus denies Plaintiffs the equal protection of law.

3. The Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax attached hereto as Exhibit "C" and thus denied Plaintiffs the equality of law guaranteed to them by the Fifth Amendment to the United States Constitution.

4. In enacting, adopting and implementing Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Jicarilla Tribal Council denied Plaintiffs the equal protection of law guaranteed them by the Indian Civil Rights Act, 25 U.S.C. § 1302 and Article II, Section 18 of the New Mexico Constitution.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any

action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax and for such other and further relief as the Court shall deem just.

Third Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action by reference as though fully stated herein.

2. Under each of the leases described in Exhibit "A" the Secretary of the Interior, as trustee for the Tribe, contracted and agreed he would not thereafter approve any ordinance or regulation which would effect any change in the rate of royalty under the lease, without the written consent of the parties to the lease. Such clause requires lessees to abide by duly promulgated regulations within the following limitations:

> "Regulations. — To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 C.F.R. 221: *Provided* that no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

3. Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, is a regulation "effecting a change in rate of royalty or annual rental".

4. By approving Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Secretary of the Interior, as trustee for the Jicarilla Apache Tribe, has breached and violated the express provisions of Plaintiff's leases.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance

Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax on any of the Plaintiffs named herein or, in the *alternative, to award Plaintiffs the full present value of each of the leases* outlined in Exhibit "A" and for such other and further relief as the Court shall deem just.

Fourth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action as though the same were set forth fully herein.

2. The Secretary of the Interior's action approving the Jicarilla Oil and Gas Severance Tax was arbitrary, capricious, not in accordance with law, contrary to Constitutional right, in excess of his statutory jurisdiction, in violation of his contracts with Plaintiffs and without observance of the procedure required by law, all in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

3. Plaintiffs are persons suffering a legal wrong, adversely affected and aggrieved by the above described action of the Secretary of the Interior under 5 U.S.C. § 701, *et seq.*

4. The Secretary of the Interior's action as described hereinbefore is final and reviewable pursuant to 5 U.S.C 701, et seq.

WHEREFORE the Plaintiffs pray this court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the defendants from taking any action whatsoever to facilitate

the enforcement of the Jicarilla Oil and Gas Severance Tax and for such other and further relief as the Court shall deem just.

Fifth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action by reference as though fully stated herein.

2. In 25 U.S.C. § 398 and 398(c) Congress gave the states the exclusive right, power and authority to levy taxes upon the output of oil and gas wells, "or rights, property or assets of any lessee upon lands within Executive Order Indian reservations in the same manner as such taxes are otherwise levied and collected."

3. Pursuant to the Congressional authorization provided in 25 U.S.C. § 398 and 398(c), New Mexico has imposed and collected a severance tax on oil and gas produced on the Jicarilla Apache Reservation. In 1975, New Mexico received $636,391.00 in revenue from just the gas severance tax imposed on gas produced on the Jicarilla Apache Reservation and it is estimated such figure will be substantially higher in 1977.

4. In addition to an Oil and Gas Severance Tax, the State of New Mexico imposes and collects the Oil and Gas Emergency School Tax, an Oil and Gas Conservation Tax, the Oil and Gas Ad Valorem Tax, the Oil and Gas Production Equipment Ad Valorem Tax and the Natural Gas Processors Tax on the Plaintiffs' oil and gas production on the Jicarilla Reservation.

5. The state is required to impose the taxes described above in order to provide governmental services to the Jicarilla Apache Reservation.

6. The Jicarilla Oil and Gas Severance Tax amounts to 12% of the interstate price of old gas and when interposed upon the New Mexico Severance Tax collected on the same gas the combined tax burden amounts to 29% of the interstate price of old

gas. Such tax is passed on under contract to the ultimate gas consumer.

7. The Jicarilla Oil and Gas Severance Tax is therefore, without Congressional authorization and in direct conflict with the oil and gas severance tax levied and collected by the State of New Mexico from the Plaintiffs pursuant to express Congressional authorization.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax and for such other relief as the Court deems just.

Sixth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action by reference as though fully stated herein.

2. In 1934 Congress enacted the Indian Reorganization Act, 25 U.S.C. 476-477. That Act granted to Indian Tribes certain specified powers in addition to those which they had previously exercised. The Indian Reorganization Act did not expressly grant Indian Tribes the power of taxation over non-Indian's use of reservation property.

3. The Jicarilla Apache Tribe had never claimed, had not been granted nor had it exercised any power of taxation over activities of non-Indians on their Executive Order Reservation prior to 1934; therefore under the provisions of the Indian Reorganization Act, 25 U.S.C. Section 476-477, the Jicarilla Apache Tribe now lacks Congressional authorization to tax the activities of non-Indians upon their Reservation and particularly those oil and gas leases which have been expressly sanctioned and

authorized by the Secretary of the Interior, acting on behalf of the Tribe under specific Congressional authority (25 U.S.C.A. § 398 and 398(c)), which gave the exclusive authority to tax such oil and gas production to the states.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax, that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax as enacted by the Tribal Council of the Jicarilla Apache Tribe and for such other relief the Court deems just.

Seventh Cause of Action

1. Plaintiffs adopt Paragraphs 1 through 31 of the First Cause of Action as though the same were set forth fully herein.

2. Title 4 of the Jicarilla Tribal Oil and Gas Severance Tax, attached hereto as Exhibit "C", provides an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe."

3. The written instructions from the Tribe to the Plaintiffs, attached hereto as Exhibit "D", direct that the tax should be paid on gas, crude oil or condensate "produced on the Jicarilla Apache reservation and sold or transported off the reservation."

4. The Interstate Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution prohibits a discriminatory tax from being unequally applied against interstate commerce.

5. Since the Jicarilla Oil and Gas Severance Tax applies only to gas and oil "sold or transported off the reservation" such tax is violative of Article I, Section 8, Clause 3, of the United States Constitution.

WHEREFORE: the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to enforce or facilitate the collection of the Jicarilla Oil and Gas Severance Tax and for such other and further relief as the Court shall deem just.

Eighth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action as though the same were fully set forth herein.

2. This portion of the Complaint is brought as a declaratory judgment action to determine the constitutional and contractual rights of the parties hereto pursuant to 28 U.S.C. 2201, *et seq.*

3. An actual justicable controversy exists between the Plaintiffs and the Defendants as to the constitutionality, legality and applicability of the Jicarilla Oil and Gas Severance Tax, as contained in Exhibit "C" to the oil and gas leases issued to the Plaintiffs by the Secretary of the Interior and more fully described in Exhibit "A".

WHEREFORE Plaintiffs request that this Court declare: (1) that the plaintiffs are in no way liable for any amount alleged to be due under the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit "C", (2) that the Jicarilla Apache Tribal Council was without legal authority to issue such ordinance, that the (3) Secretary of the Interior's approval of such ordinance was unlawful and unconstitutional, that such (4) ordinance is void and of no effect, and that the (5) Jicarilla Apache Tribe lacks legal power and authority to impose any nature of tax upon or with respect to oil and gas production from Reservation lands.

Attorneys for the Plaintiffs:
KELLAHIN & FOX
Jason W. Kellahin, Esq.
Post Office Box 1769
Santa Fe, New Mexico 87501
CAMPBELL, BINGAMAN AND BLACK, P.A.
Bruce D. Black, Esq.
Post Office Box 2208
Santa Fe, New Mexico 87501

By: .....
Bruce D. Black

EXHIBIT NO. A

Chase Oil Company, Inc.

Contract No.	Description
70	T24N, R4W: Secs. 27, 28, 34, Sec. 33 – N/2, SE/4
71	T23N, R4W: Sec. 3 – N/2, SW/4; Secs. 9, 10
47	T23N, R4W: Sec. 11 – S/2; Sec, 12; Sec. 14 – NE/4
363	T22N, R4W: Sec. 21 – S/2
15	T23N, R3W: Secs. 19, 20; Sec. 29 – SW/4

Dugan Production Corporation

Contract No.	Description
416	T24N, R4W: Secs. 25, 26, 35, 36
241	T28N, R1W: Sec. 14 – W/2 SW/4
12	T24N, R5W: Sec. 21 – SE/4
127	T24N, R4W: Sec. 3 – NE/4
116	T26N, R3W: Sec. 21
117	T26N, R3W: Sec. 27 – W/2
465	T30N, R1 E: Sec. 6 – NW/4
453	T29N, R3W: Sec. 15, 16, 21, 22
37-A	T24N, R5W: Sec. 13 – SW/4; Sec. 14 – NE/4, SW/4; Sec. 23 – NE/4

Consolidated Oil & Gas, Inc.

Contract No.	Description
97	T26N, R3W: Secs. 5, 6, Sec. 7 – E/2 Sec. 8 – W/2
101	T26N, R4W: Sec. 2 – Lots 1, 2, 3, 4, S/2 N/2 S/2, Sec. 11
106	T26N, R4W: Sec. 26 – E/2
105	T26N, R4W: Sec. 13 – E/2
116	T26N, R3W: Sec. 22 – S/2
117	T26N, R3W: Sec. 34 – E/2; Sec. 27 – E/2
119	T26N, R4W: Sec. 6 – Lots 3, 4, 5, 6, 7, SE/4 NW/4, E/2, SW/4 (W/2); Sec. 5 – Lots 1, 2, 3, 4, S/2, N/2, S/2
152	T26N, R5W: Sec. 8 – N/2

Energy Resources Group

Contract No.	Description
35	T24N, R5W: Sec. 1; Sec. 2 – N/2, SW/4, Sec. 11 – NW/4, Sec. 12 – N/2, SE/4 T24N, R5W: Sec. 35 – S/2; Sec. 36 – S/2

J. M. Huber Corporation

Contract No.	Description
506	T29N, R2W: Secs. 27, 28, 33, 34
504	T29N, R2W: Sec. 17; Sec. 18 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 19 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 20
503	T29N, R2W: Secs. 15, 16, 21, 22
499	T29N, R2W: Sec. 1 – Lots 1, 2, 3, 4, S/2 N/2, S/2 Secs. 11, 12
495	T29N, R1W: Sec. 5 – Lots 1, 2, 3, 4, S/2 N/2, S/2; Sec. 6 – Lots 1, 2, 3, 4, 5, 6, 7, S/2 NE/4, SE/4 NW/4, E/2 SW/4, SE/4; Sec. 7 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 8
486	T28N, R2W: Sec. 5 – Lots 1, 2, 3, 4 S/2 N/2 S/2; Sec. 6 – Lots 1, 2, 3, 4, 5, 6, 7, S/2 NE/4, SE/4 NW/4, E/2 SW/4, SE/4; Sec. 7 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 8

Supron Energy Corporation

Contract No.	Description
10	T25N, R5W: Sec. 33 – S/2; Sec. 34 – S/2 T24N, R5W: Secs. 3, 4; Sec. 9 – N/2; Sec. 10 – N/2
107	T26N, R4W: Secs. 27, 28, 33, 34
106	T26N, R4W: Secs. 25, 26, 35, 36
105	T26N, R4W: Secs. 13, 14, 23, 24
101	T26N, R4W: Sec. 1 – Lots 1, 2, 3, 4, S/2 N/2, S/2; Sec. 2 – Lots 1, 2, 3, 4 S/2 N/2, S/2; Secs. 11, 12
104	T26N, R4W: Secs. 15, 16, 21, 22

Supron Energy Corporation — Continued

Contract No.	Description
103	T26N, R4W: Sec. 17; Sec. 18 – Lots, 1, 2, 3, 4, E/2, E/2 W/2; Sec. 19 – Lots 1, 2, 3, 4, E/2, E/2 W/2; Sec. 20
100	T26N, R3W: Secs. 29, 30, 31, 32
47	T23N, R4W: Secs. 11, 12, 13, 14
418	T24N, R5W: Sec. 3 – W/2; Sec. 4 – SW/4 Sec. 9 – NW/4
150	T26N, R5W: Secs. 1, 2, 11, 12
417	T22N, R3W: Secs. 9, 10, 15, 16
153	T26N, R5W: Secs. 25, 26, 35, 36
145	T25N, R5W: Secs. 1, 2, 11, 12
10	

Southland Royalty Company
Aztec Oil & Gas Co., subsidiary

Contract No.	Description
100	T26N, R3W: Secs. 29, 30, 31, 32
101	T26N, R4W: Secs. 1, 2, 11, 12
103	T26N, R4W: Secs. 17, 18, 19, 20
105	T26N, R4W: Secs. 13, 14, 23, 24
106	T26N, R4W: Secs. 25, 26, 35, 36
145	T25N, R5W: Secs. 1, 2, 11, 12
150	T26N, R5W: Secs. 1, 2, 11, 12
153	T26N, R5W: Secs. 25, 26, 35, 36
124	T25N, R4W: Secs. 13, 14, 23, 24
125	T25N, R4W: Secs. 25, 26, 35, 36
151	T26N, R5W: Secs. 3, 4, 9, 10
416	T24N, R4W: Secs. 25, 26, 35, 36
446	T27N, R3W: Secs. 7, 8, 17
447	T27N, R3W: Secs. 18, 19
449	T28N, R3W: Secs. 19, 30, 31
451	T24N, R3W: Secs. 3, 4, 9, 10
452	T29N, R3W: Secs. 5, 6, 7, 8
456	T30N, R3W: Secs. 1, 2, 11, 12
457	T30N, R3W: Secs. 3, 4, 9, 10
458	T30N, R3W: Secs. 5, 6, 7, 8

Southland Royalty Company
Aztec Oil & Gas Co., subsidiary — Continued

Contract No.	Description	
459	T30N, R3W:	Secs. 17, 18, 19, 20
460	T30N, R3W:	Secs. 15, 16, 21
461	T30N, R3W:	Secs. 13, 14, 24
462	T30N, R3W:	Secs. 22, 23, 26
463	T30N, R3W:	Secs. 25, 35, 36
464	T30N, R3W:	Secs. 29, 30, 31, 32
466	T28N, R3W:	Sec. 3
467	T28N, R3W:	Sec. 29
468	T28N, R3W:	Sec. 32
469	T29N, R3W:	Sec. 17
470	T29N, R3W:	Sec. 18
471	T29N, R3W:	Sec. 27
471	T29N, R3W:	Sec. 34
475	T31N, R3W:	Secs. 21, 22, 27, 28
476	T31N, R1W:	Secs. 23, 24, 25, 26
434	T22N, R4W:	Secs. 4, 5, 6,
435	T22N, R4W:	Secs. 7, 8, 9, 10
443	T23N, R2W:	Secs. 25, 26, 35, 36

Atlantic Richfield Company

Contract No.	Description	
111	T24N, R4W:	Secs. 5, 6, 7, 8
108	T26N, R4W:	Secs. 13, 14, 23, 24
109	T26N, R5W:	Secs. 15, 16, 21, 22
110	T26N, R5W:	Secs. 17, 18, 19, 20

Phillips Petroleum Company

Contract No.	Description	
81	T29N, R3W:	Secs. 19, 20, 29, 30
82	T29N, R3W:	Secs. 31, 32
	T28N, R3W:	Secs. 5, 8
83	T28N, R3W:	Secs. 6, 7, 16, 17, 18
84	T28N, R3W:	Secs. 20, 21, 28, 33

Phillips Petroleum Company — Continued

Contract No.	Description
90	T27N, R3W: Secs. 9, 10, 16, 21, N/2 Sec. 15
92	T27N, R3W: Secs. 20, 29, 30, 31
93	T27N, R3W: Secs. 28, 32, 33, 34
60	T28N, R3W: Secs. 14, 15, 22, 23
61	T28N, R3W: Secs. 26, 27, 34, 35

Getty Oil Company

Contract No.	Description
34	T25N, R5W: Sec. 21 – S/2; Sec. 22 – W/2; Secs. 27, 28; Sec. 33 – N/2; Sec. 34 – N/2
68	T25N, R5W: Secs. 31, 32 T24N, R5W: Secs. 5, 6
44	T23N, R4W: Secs. 5, 6, 7, 8

Continental Oil Company

Contract No.	Description
38	T24N, R5W: Secs. 31, 32 T23N, R5W: Secs. 5, 6
39	T24N, R5W: Sec. 33 - S/2; Sec. 34 - S/2 T23N, R5W: Secs. 3, 4
77	T23N, R5W: Secs. 9, 10, 15, 16
102	T26N, R4W: Secs. 3, 4, 9, 10
109	T26N, R5W: Secs. 15, 16, 21, 22
110	T26N, R5W: Secs. 17, 18, 19, 20
121	T25N, R4W: Secs. 1, 2, 11, 12
122	T25N, R4W: Secs. 3, 4, 9, 10
124	T25N, R4W: Secs. 13, 14, 23, 24
147	T25N, R5W: Secs. 5, 6, 7, 8
151	T26N, R5W: Secs. 3, 4, 9, 10
36	T24N, R5W: Sec. 9 - S/2; Sec. 10 - S/2; Secs. 15, 16; Sec. 21 - N/2; Sec. 22 - N/2
41	T25N, R4W: Secs. 29, 30, 31, 32
66	T25N, R4W: Secs. 27, 28, 33, 34
65	T25N, R4W: Secs. 15, 16, 21, 22
64	T25N, R4W: Secs. 17, 18, 19, 20

Continental Oil Company — Continued

Contract No.	Description
48	T24N, R4W: Secs. 17, 18, 19, 20
78	T23N, R5W: Secs. 11, 12, 13, 14
125	T25N, R4W: Secs. 25, 26, 35, 36
65	T23N, R4W: Secs. 17, 18, 19, 20
108	T26N, R5W: Secs. 13, 14, 23, 24

Chace Oil Company, Inc.

Contract No.	Description
70	T24N, R4W: Secs. 27, 28, 34, Sec. 33 - N/2, SE/4
71	T23N, R4W: Sec. 3 - N/2, SW/4; Secs. 9, 10
47	T23N, R4W: Sec. 11 - S/2; Sec. 12; Sec. 14 - NE/4
363	T22N, R4W: Sec. 21 - S/2
15	T23N, R3W: Secs. 19, 20; Sec. 29 - SW/4

Dugan Production Corporation

Contract No.	Description
241	T28N, R1W: Sec. 14 - W/2 SW/4
12	T24N, R5W: Sec. 21 - SE/4
127	T24N, R4W: Sec. 3 - NE/4
116	T26N, R3W: Sec. 21
117	T26N, R3W: Sec. 27 - W/2
465	T30N, R1E: Sec. 6 - NW/4
453	T29N, R3W: Sec. 15, 16, 21, 22
37-A	T24N, R5W: Sec. 13 - SW/4; Sec. 14 - NE/4, SW/4; Sec. 23 - NE/4

Consolidated Oil & Gas, Inc.

Contract No.	Description
97	T26N, R3W: Secs. 5, 6, Sec. 7 - E/2; Sec. 8 - W/2
101	T26N, R4W: Sec. 2 - Lots 1, 2, 3, 4, S/2 N/2 S/2, Sec. 11

Consolidated Oil & Gas, Inc. — Continued

Contract No.	Description
106	T26N, R4W: Sec. 26 - E/2
105	T26N, R4W: Sec. 13 - E/2
116	T26N, R3W: Sec. 22 - S/2
117	T26N, R3W: Sec. 34 - E/2; Sec. 27 - E/2
119	T26N, R4W: Sec. 6 - Lots 3, 4, 5, 6, 7, SE/4 NW/4, E/2 SW/4 (W/2); Sec. 5 - Lots 1, 2, 3, 4, S/2 N/2, S/2
152	T26N, R5W: Sec. 8 - N/2

Energy Resources Group

Contract No.	Description
35	T24N, R5W: Sec. 1; Sec. 2 - N/2, SW/4, Sec. 11 - NW/4; Sec. 12 - N/2, SE/4
25	T24N, R5W: Sec. 35 - S/2; Sec. 36 - S/2

Jerome T. McHugh

Contract No.	Description
82	
84	
90	
98	
115	
116	
117	
120	

Amerada Hess Corporation

Contract No.	Description

Tenneco Oil Company

Contract No.	Description
108	T26N, R4W: Secs. 13, 14, 23, 24
109	T26N, R5W: Secs. 15, 16, 17, 18
110	T26N, R5W: Secs. 17, 18, 19, 20
111	T24N, R4W: Secs. 5, 6, 7, 8
420	T22N, R3W: Secs. 29, 30, 31, 32

Tesoro Petroleum Corporation

Contract No.	Description
420	T22N, R3W: Sec. 29 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4; Sec. 30 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4 Sec. 31 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4; Sec. 32 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4

Contract, Jicarilla Tribal 119

Form 5-157
November 1947

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE — TRIBAL INDIAN LANDS
JICARILLA APACHE TRIBE, STATE OF NEW MEXICO

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 24th day of April, 1953, by and between Frank Vigil, Chairman of the Jicarilla Apache Tribal Council of Dulce, State of New Mexico, for and on behalf of the Jicarilla Apache Tribe of Indians, designated herein as lessor, and Phillips Petroleum Company of Bartlesville, State of Oklahoma, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of $71,345.99, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Rio Arriba, State of New Mexico, and more particularly described as follows:

Tract No. 216 — Township 26 North, Range 4 East, N.M.P.M. Section 5, Lots 1, 2, 3, 4, S/2 W/2, S/2 (ALL)

Section 6, Lots 1, 2, 3, 4, 5, 6, 7, S/2 NE/4, SE/4 NW/4, N/2 SW/4, SE/4 (ALL) Section 7, Lots 1, 2, 3, 4, E/2 W/2, E/2 (ALL) Section 8, ALL

containing 2557.18 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe-lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(a) *Bond.* — To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(b) *Wells. — (1) To drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage:* PROVIDED, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior; (2) at the election of the lessee to drill

and produce other wells: PROVIDED, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (3) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of this lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty hereinafter specified.

(c) *Rental and royalty.* — To pay, beginning with the date of approval of the lease by the Secretary of the Interior or his duly authorized representative, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lesssee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount

realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: PROVIDED, That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: AND PROVIDED FURTHER, That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in Section 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the treasurer of said tribe* or the superintendent. All such rental and royalty payments shall be mailed to the oil and gas supervisor for transmittal to the treasurer of said tribe or to the superintendent. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, cr on the products therof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is greater.

---

* All payments under this lease shall be made to the superintendent where the tribe is not organized under the act of June 18, 1934 (48 Stat. 984).

(d) *Monthly statements.* — To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the treasurer of said tribe or the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

(e) *Log of well.* — To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the lessee showing the strata and character of the formations passed through by the drill, which log or a copy thereof shall be furnished to the oil and gas supervisor.

(f) *Diligence, prevention of waste.* — To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to

prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations; PROVIDED, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

(g) *Regulations.* — To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: PROVIDED, That no regulation hereafter approved shall effect a change in rate or royalty or annual rental herein specified without the written consent of the parties to this lease.

(h) *Assignment of lease.* — Not to assign this lease or any interest therein by an operating agreement or otherwise not to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

4. The lessor expressly reserves:

(a) *Disposition of surface.* — The right to lease, sell or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the lessee herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.

(b) *Use of gas.* — The right to use sufficient gas free of charge for any school or other buildings belonging to the tribe on said lands by making connection at its own expenses with the

well or wells thereon, the use of such gas to be at the lessor's risk at all times.

(c) *Royalty in kind.* — The right to elect on 30 days' written notice to take lessor's royalty in kind.

5. Surrender and termination. — The lessee shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of the sum of one dollar and all rentals, royalties, and other obligations due and payable to the lessor; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lands not so surrendered. If this lease has been recorded lessee shall file a recorded release with his application to the superintendent for termination of this lease.

6. Cancellation and forfeiture. — When, in the opinion of the Secretary of the Interior and the Tribal Council, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: PROVIDED, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.

7. Removal of buildings, improvements, and equipment. — Lessee shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lease, any and all buildings, structures, casing, material,

and/or equipment placed thereon for the purpose of development and operation hereunder, save and except casing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination thereof; and except as otherwise provided herein, all casing in wells, material structures, and equipment shall be and become the property of the lessor.

8. Drilling and producing restrictions. — It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

9. Unit operation. — The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

10. Helium—public emergency. — It is covenanted and agreed that helium gas, carbon dioxide gas, and all other natural gases are included under the term "gas" as used in this lease, and in the event gas is discovered containing helium the United States Government shall have the right to purchase, at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the

option to purchase all or any part of the products produced under this lease.

11. Conservation. — The lessee in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.

12. Heirs and successors in interest. — It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

13. No lease, assignment thereof, or interest therein, will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

The attached Special Stipulation in two pages and the Forest and Land Protection Stipulation in two pages, are hereby made part of this lease.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

_____

P.O. _____

_____

P.O. _____

[SEAL]

s/ FRANK VIGIL

Frank Vigil, *Chairman*
Jicarilla Apache Tribal Council

[SEAL]

s/ CEVERO JARAMILLO

Cevero Jaramillo, *Secretary*
Jicarilla Apache Tribal Council

[SEAL]

Two witnesses to execution by lessee:

s/ OWEN J. JONES

P.O. Bartlesville, Oklahoma

s/ NORMA BUTCHER

P.O. Bartlesville, Oklahoma

PHILLIPS PETROLEUM COMPANY

By _____

Title _____
Vice President

Attest: _____
Assistant Secretary

ACKNOWLEDGEMENT OF LESSOR

STATE OF New Mexico
COUNTY OF Rio Arriba ss.

Before me, a notary public, on this 24th day of April, 1953, personally appeared FRANK VIGIL, Chairman of the Jicarilla Apache Tribal Council, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires August 24, 1956

[SEAL]

s/ SYLVAN C. VERMILLION
Sylvan C. Vermillion
Notary Public

UNITED STATES
DEPARTMENT OF THE INTERIOR
Washington, D.C., June 15, 1953

The within lease is hereby ..... approved.

Approved under authority delegated by Secretarial Order No. 2508, January 11, 1949 (14 F.R. 258-260) Order No. 551, Amendment 3 16 F.R. 8252

Commissioner of Indian Affairs

Filed for record this 28 day of August, 1957 at 1 o'clock p.m.

Received 8-28, 1957 in Vol. 31, Page 303-306.

s/ JESSE S. SALAZAR
County Clerk or Recorder

Rental received $.....

EXHIBIT D

TO: ALL OIL AND GAS LESSEES, OPERATORS AND PURCHASING COMPANIES DOING BUSINESS ON THE JICARILLA APACHE RESERVATION

Enclosed is a copy of the Oil and Gas Severance Tax Ordinance No. 77-0-2 enacted by the Tribal Council of the Jicarilla Apache Tribe on July 9, 1976 and approved on behalf of the Secretary of the Interior December 22, 1976.

The Oil and Gas Severance Tax Ordinance levies a severance tax of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the reservation, and a severance tax of 29¢ per barrel of crude oil or condensate, as measured under the terms of the ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the reservation.

The effective date of the severance tax is the first day of the fourth month following the approval of the ordinance by the Tribal Council and the Secretary of the Interior or his authorized representative. The effective date of the tax is April 1, 1977, and initial Operator's Report Remittance forms are due in the Accounting Office of the Tribe for the month of April, 1977, within 45 days after April 30, 1977. Initial tax remittances are also due at that time.

Enclosed for your reference is the Operator's Remittance Report form to be used in reporting taxes remitted. Instructions for completion of the report are printed on the back of the report.

Thank you for your cooperation.

JICARILLA APACHE TRIBE

GENERAL INSTRUCTIONS

Remitting Period

Each calendar month is a reporting period.

Who Must Report

Each operator must report monthly on the Operator's Remittance Form. Each operator must report all of his production each month.

Who Must Admit Taxes

Taxes shall be remitted to the Tribe by the operator of a well. However, a purchaser may, by express or implied agreement with the operator, remit taxes on behalf of the operator. One of the persons must report all taxes due on an individual well, or one report may be filed for all wells on a lease.

Due Date Of Report And Remittance

Operator's reports and accompanying remittances are due in the Accounting Office of the Tribe, P.O. Box 507, Dulce, New Mexico 87528, within 45 days following the end of the calendar month covered by the report. There is no provision for an extension of the prescribed due date. Interest on past due taxes will be computed at the rate of 1% per month or fraction thereof.

Tax Refunds

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe. Any refund allowed may be in the form of credit against future tax payments.

To apply for a tax refund, an operator must submit an amended Operator's Remittance Report, using the same form as the Operator's Remittance Report, but showing the tax properly computed and attaching a copy of the original Operator's Remittance Report. Accompanying this should be a letter of explanation to the Treasurer of the Tribe requesting a refund.

Taxes Paid Under Protest

Any person paying a severance tax may pay such tax under protest by filing a Notice of Protest with the Treasurer of the Tribe *at the time of payment.* The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded, and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 6% per annum shall be allowed on the amount erroneously or illegally collected.

INSTRUCTION FOR OPERATOR'S REMITTANCE REPORT

Lease No., Reporting Period, Lessee, Operator, Reporting Company

Fill in all information requested. If supplemental reports are necessary, please number each page in the upper right-hand corner. The lease number to be reported is the Jicarilla Apache tract number as shown on the lease.

Well No. Column

Describe each well as clearly as possible and provide the well number used in the Bureau of Indian Affairs well completion report.

Production Volume

For each product produced, report the barrels of oil and condensate and the MCF of natural gas. For natural gas provide the average BTU content. Taxes on natural gas are to be paid on the basis of a rate per million BTU of gas produced on the reservation and sold or transported off the reservation. To arrive at the million BTU tax basis for natural gas, multiply the volume of production in MCF by the BTU content and report the million

BTU tax base in the column provided. Report volume to the nearest whole barrel or MCF.

Tax Rate

Insert the appropriate tax rate in the tax rate column as follows:

Natural gas	$0.05 per million BTU
Oil and condensate	$0.29 per barrel

Tax Remitted

Insert the amount of tax remitted for each product in the "Tax Remitted" column. This amount is calculated by multiplying the tax rate by the tax base, which is barrels of production for oil and condensate, and million BTUs of production for natural gas. Add the total tax remitted for each product on each well to arrive at the total tax remitted for the lease. Fill in the name of the payor of the check and the check number.

JICARILLA APACHE TRIBE
OIL & GAS ACCOUNTING OFFICE

P. O. Box 507 Dulce, N.M. 87520

SEVERANCE TAX DIVISION

OPERATOR'S REMITTANCE REPORT

Lease No._____

Report Period_____, 19____ to_____, 19____

Lessee:_____

_____

(Address)

Operator:_____

_____

(Address)

Reporting Company (If different from Operator):

_____

_____

(Address)

Well No.	Product	Production Volume (Bbls or MCF)	BTUs (Gas)	Million BTUs (Gas)	Tax Rate	Tax Remitted
	Oil					
	Condensate					
	Gas					
	Oil					
	Condensate					
	Gas					
	Oil					
	Condensate					
	Gas					
	Oil					
	Condensate					
	Gas					

(Use supplemental sheets if necessary)

TOTAL TAX REMITTED_____

Paid by Check No._____

This Report, submitted by _____(company), consisting of ____ pages, had been examined by me and to the best of my knowledge and belief it is true, complete and pursuant to law.

_____ _____ _____

Signature Title Date

JICARILLA APACHE TRIBE
ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX

Ordinance No. 77-0-02
as amended by Ordinance No. 77-0-195

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED; That effective on the date set forth hereinafter, a severance tax is imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax — Gas*

The severance tax set forth herein shall be at the rate of $.05 per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax — Oil*

The severance tax set forth herein shall be at the rate of $0.29 per barrel of crude oil or condensate as measured under the terms of this Ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of

such gas, as reported by the operator or producer to the U.S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in accordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Refund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money in the fund which is unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01, the amount of money which is reported

to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments..

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate

under the laws of the United States. Any amount of tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under §§11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

Adopted by the Tribal Council July 9, 1976

Approved by the Secretary of the Interior December 23, 1976

COMPLAINT OF
AMOCO PRODUCTION COMPANY, ET AL.,
NO. 77-343-P, U. S. DISTRICT COURT,
NEW MEXICO

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMOCO PRODUCTION COMPANY, a corporation and MARATHON OIL COMPANY, a corporation,
Plaintiffs,

v. No. 77-343-P

JICARILLA APACHE TRIBE; JICARILLA APACHE TRIBAL COUNCIL; GWENDOLYN VELARDE, Treasurer of the Jicarilla Apache tribe; CECIL ANDRUS, Secretary of the Interior; TONY MARTINEZ, Executive Director, New Mexico Oil and Gas Accounting Commission,
Defendants.

COMPLAINT

(Filed June 14, 1977)

For their claims against the Defendants, Plaintiffs state:

COUNT I

1. Amoco Production Company (Amoco) is a Delaware corporation with its principal place of business in Illinois.

2. Marathon Oil Company (Marathon) is an Ohio corporation with its principal place of business in Ohio.

3. Defendant Jicarilla Apache Tribe (hereinafter referred to as the "Tribe") is an Indian tribe organized pursuant to 25 U.S.C. § 476-477, residing on an executive order Indian reservation within the State of New Mexico.

4. The legislative powers of the Jicarilla Apache Tribe reside in the Defendant, Jicarilla Apache Tribal Council (hereinafter "Tribal Council"). The Defendant Gwendolyn Velarde is the

Treasurer of the Jicarilla Apache Tribe and as such is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax.

5. The Defendant Cecil Andrus is the Secretary of the Interior of the United States of America.

6. The Defendant Tony Martinez, is the duly appointed and acting Executive Director of the New Mexico Oil and Gas Accounting Commission and as such is responsible for the enforcement and collection of the following taxes levied and collected by the State of New Mexico upon production of oil or gas by Plaintiffs from leases held by Plaintiffs upon lands within the Executive Order Reservation of the Tribe:

A. Oil and Gas Severance Tax Act, N.M.S.A. § 72-19-1, *et seq.*;

B. Oil and Gas Emergency School Tax Act, N.M.S.A. § 72-21-1, *et seq.*;

C. Oil and Gas Ad Valorem Production Tax Act, N.M.S.A. § 72-22-1, *et seq.*;

D. Oil and Gas Production Equipment Ad Valorem Tax Act, N.M.S.A. § 72-24-1, *et seq.*;

E. Oil and Gas Conservation Tax Act, N.M.S.A. § 72-20-1, *et seq.*

7. The matter in controversy exceeds the sum of ten thousand ($10,000) dollars exclusive of interest and costs.

8. This action arises under Article I, Section 8, Clause 3 of the United States Constitution; Article II, Section 2 of the United States Constitution; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; 25 U.S.C. §§ 476 and 477; 25 U.S.C. § 1301, *et seq.*; 25 U.S.C. § 398(c); 42 U.S.C. § 1983; and 5 U.S.C. § 706, all as more fully appears herein. Federal question

jurisdiction is thus conferred on this Court by 28 U.S.C. § 1331 and jurisdiction is also conferred by 28 U.S.C. § 1343(3).

9. The Tribe is now and has been at all pertinent times the beneficial owner of the royalty interest created by oil and gas leases on its Executive Order Reservation Lands, which leases were granted by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 398 and 25 U.S.C. § 396.

10. Plaintiffs each hold one or more oil and gas leases granted by the Secretary of the Interior as described in paragraph 9 above, covering lands within the Executive Order Reservation of the Tribe. A copy of the lease form typically used is attached hereto and made a part hereof as Exhibit A. Plaintiffs each produce oil or gas from the lands covered by such leases.

11. On or about November 22, 1968, the Tribe, without lawful authority or procedure, adopted a "Revised Constitution," which reads in relevant part:

> "The Tribal Council may levy and collect taxes and fees on Tribal members, and may enact ordinances subject to approval by the Secretary of Interior, to impose taxes and fees on non-members of the Tribe doing business on the reservation."

12. On information and belief the Amended Constitution adopted by the Tribe on December 23, 1968, was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969, without hearing or due consideration.

13. On or about July 9, 1976, the Tribal Council, without lawful authority, adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, to levy an oil and gas severance tax of five cents per million British Thermal Units (BTU) of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation and twenty-nine cents per barrel on crude oil or condensate produced on the reservation and sold or transported off the reservation. A copy of said Ordinance is

attached hereto and made a part hereof as Exhibit B, and referred to hereinafter as the Jicarilla Oil and Gas Severance Tax.

14. On information and belief the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit B, was approved by the Secretary of the Interior of the United States on or about December 23, 1976, without hearing or due consideration.

15. Along with the copy of the ordinance attached hereto as Exhibit B, the Jicarilla Apache Tribe served upon each of the Plaintiffs a copy of instructions on the applicability and procedural requirements of the Jicarilla Oil and Gas Severance Tax contained in Exhibit B. Said instructions are attached hereto and made a part hereof as Exhibit C. Under instructions contained in Exhibit C, Plaintiffs are ordered to submit "initial operator's report remittance forms" within forty-five days after April 30, 1977, or no later than June 14, 1977. The instructions attached hereto as Exhibit C further provide that "initial tax remittances are also due at that time."

16. In the event such tax is ultimately held to be invalid, Plaintiffs would be irrevocably harmed by having to pay such tax under protest in that they would be forced to attempt to recover the tax from the Tribe. There is no quarantee under the Jicarilla Oil and Gas Severance Tax that any Jicarilla tax assessements paid by the Plaintiffs under protest would be returned. To the contrary, Paragraph 11 of the Jicarilla Oil and Gas Severance Tax specifically provides: "Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of a credit against future tax payments."

17. Plaintiffs have no plain, speedy and adequate remedy at law.

18. In so adopting, approving and undertaking the implementation of the severance tax ordinance attached hereto as Exhibit B without notice to, or an opportunity for a hearing by

the Plaintiffs, the Defendants, Tribe, Tribal Council, Velarde, and Secretary of the Interior have denied the Plaintiffs the due process of law guaranteed them by Fifth and Fourteenth Amendments to the United States Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, and Article II, Section 18 of the New Mexico Constitution.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT II

1. Plaintiffs incorporate paragraphs 1 through 18 of Count I of this Complaint by reference as though fully set forth herein.

2. The Jicarilla Oil and Gas Severance Tax embodied in Exhibit B applies only to oil and gas "produced on the Jicarilla Apache Reservation" and thus imposes a discriminatory tax upon Plaintiffs, not imposed upon oil and gas produced from similarly situated land held in trust by the federal government or similarly situated land in the San Juan Basin, a well-defined and well-known producing area of oil and gas in northwest New Mexico, and such tax thus denies Plaintiffs the equal protection of law.

3. The Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax attached hereto as Exhibit B and thus denied Plaintiffs the equality of law guaranteed to them by the Fifth Amendment to the United States Constitution.

4. In enacting, adopting and implementing Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Jicarilla Tribal Council denied Plaintiffs the equal protection of law guaranteed them by the Indian Civil Rights Act, 25 U.S.C. § 1302 and Article II, Section 18 of the New Mexico Constitution.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT III

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. Under each of the leases described in Count I the Secretary of the Interior, as trustee for the Tribe, contracted and agreed he would not thereafter approve any ordinance or regulation which would effect any change in the rate of royalty under the lease, without the written consent of the parties to the lease. Such clause requires lessees to abide by duly promulgated regulations within the following limitations:

> "Regulations. — To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 C.F.R. 221: *Provided* that no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

3. Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, is a regulation effecting "a change in rate of royalty or annual rental."

4. By approving Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Secretary of the Interior, as trustee for the Jicarilla Apache Tribe, has breached and violated the express provisions of Plaintiffs' leases.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT IV

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. The Secretary of the Interior's action approving the Jicarilla Oil and Gas Severance Tax was arbitrary, capricious, not in accordance with law, contrary to Constitutional right, in excess of his statutory jurisdiction, in violation of his contracts with Plaintiffs and without observance of the procedure required by law, all in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

3. Plaintiffs are persons suffering a legal wrong, adversely affected and aggrieved by the above-described action of the Secretary of the Interior under 5 U.S.C. § 701, *et seq.*

4. The Secretary of the Interior's action as described hereinbefore is final and reviewable pursuant to 5 U.S.C. § 701, *et seq.*

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT V

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. In 25 U.S.C. §§ 398 and 398(c) Congress gave the states the exclusive right, power and authority to levy taxes upon the output of oil and gas wells, "or rights, property or assets of any lessee upon lands within Executive Order Indian Reservations in the same manner as such taxes are otherwise levied and collected."

3. Pursuant to the Congressional authorization provided in 25 U.S.C. §§ 398 and 398(c), New Mexico has imposed and collected taxes on oil and gas produced on the Jicarilla Apache Reservation. In 1975, New Mexico received $636,391.00 in revenue from just the gas severance tax imposed on gas produced on the Jicarilla Apache Reservation and it is estimated such figure will be substantially higher in 1977.

4. In addition to an Oil and Gas Severance Tax, the State of New Mexico imposes and collects the Oil and Gas Emergency School Tax, an Oil and Gas Conservation Tax, the Oil and Gas Ad Valorem Tax, and the Oil and Gas Production Equipment Ad Valorem Tax on the Plaintiffs' oil and gas production on the Jicarilla Reservation.

5. The State is required to impose the taxes described above in order to provide governmental services to the Jicarilla Apache Reservation.

6. The Jicarilla Oil and Gas Severance Tax amounts to 17% of the interstate price of old gas and when interposed upon the New Mexico taxes on production collected on the same gas the combined tax burden amounts to 29% of the interstate price of old gas. Such tax may be passed on under contract to the ultimate gas consumer only after approval by the Federal Power Commission.

7. The Jicarilla Oil and Gas Severance Tax is therefore, without Congressional authorization and in direct conflict with the taxes levied on production and collected by the State of New Mexico from the Plaintiffs pursuant to express Congressional authorization and, in addition, is contrary to the Commerce Clause of the United States Constitution.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT VI

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. 476-477. That Act granted to Indian Tribes certain specified powers in addition to those which they had

previously exercised. The Indian Reorganization Act did not expressly grant Indian Tribes the power of taxation over non-Indian's use of reservation property.

3. The Jicarilla Apache Tribe had never claimed, had not been granted nor had it exercised any power of taxation over activities of non-Indians on their Executive Order Reservation prior to 1934; therefore under the provisions of the Indian Reorganization Act, 25 U.S.C. Section 476-477, the Jicarilla Apache Tribe now lacks Congressional authorization to tax the activities of non-Indians upon their Reservation and particularly those oil and gas leases which have been expressly sanctioned and authorized by the Secretary of the Interior, acting on behalf of the Tribe under specific Congressional authority (25 U.S.C. §§ 398 and 398(c)), which gave the exclusive authority to tax such oil and gas production to the states.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT VII

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. Title 4 of the Jicarilla Tribal Oil and Gas Severance Tax, attached hereto as Exhibit B, provides an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe."

3. The written instructions from the Tribe to the Plaintiffs, attached hereto as Exhibit C, direct that the tax should be paid on gas, crude oil or condensate "produced on the Jicarilla Apache reservation and sold or transported off the reservation."

4. The Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution prohibits a discriminatory tax from being unequally applied against interstate commerce.

5. Since the Jicarilla Oil and Gas Severance Tax applied only to gas and oil "sold or transported off the reservation" such tax is violative of Article I, Section 8, Clause 3, of the United States Constitution.

WHEREFORE the Plaintiffs pray that this court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT VIII

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. The Amended Charter of the Tribe adopted on or about June 16, 1960, provides in Section 5 thereof that the powers exercised by the Tribe are: "Subject to any restrictions contained in the Constitution and Laws of the United States."

3. The revised Constitution of the Tribe adopted on or about November 22, 1968, provides in Article XI, Section 1, that the powers of the Tribal Council, including the asserted power to levy and collect taxes as quoted in paragraph 11 of Count I of this Complaint, shall be subject to: "Limitations imposed by the Constitution of the United States, applicable federal statutes and regulations of the Department of the Interior."

4. No provisions of the United States Constitution, any Indian Treaty, or statute adopted by the United States grants the Tribe or the Tribal Council any power to levy and collect any tax such as the Jicarilla Oil and Gas Severance Tax.

5. 25 U.S.C. §§ 398 and 398(c), granting the states the exclusive right, power and authority to levy taxes on the output of oil and gas wells "or rights, property or assets of any lessee upon lands within Executive Order Indian Reservations in the same manner as such taxes are otherwise levied and collected" constitutes a limitation upon the right or power, if any, of the Tribe or Tribal Council to levy and collect taxes and fees on non-members of the Tribe doing business on the reservation.

6. The adoption and enactment of the Jicarilla Oil and Gas Severance Tax and any attempt to enforce the same or collect taxes thereunder is contrary to the relevant provisions, quoted above, of the Amended Charter of the Tribe and of the Revised Constitution of the Tribe.

7. By reason thereof, the Tribe and Tribal Council were without power and authority to enact the Jicarilla Oil and Gas Severance Tax and the same is invalid.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter

a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT IX

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. The right or power, if any, of the Tribe or Tribal Council to levy and collect taxes and fees on non-members of the Tribe doing business on the reservation, may be exercised only to exclude such non-members from the Reservation.

3. By its consent to the issuance of the oil and gas leases described in paragraphs 9 and 10 of Count I of this Complaint, which such oil and gas leases were issued prior to the attempted enactment and imposition of the Jicarilla Oil and Gas Severance Tax, the Tribe consented to the presence upon the Reservation of Plaintiffs and other holders of oil and gas leases.

4. In enacting, adopting and implementing the Jicarilla Oil and Gas Severance Tax, the Tribe and Tribal Council denied Plaintiffs rights guaranteed them by the Indian Civil Rights Act, 25 U.S.C. § 1302.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT X

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. This portion of the Complaint is brought as a declaratory judgment action to determine the constitutional and contractual rights of the parties hereto pursuant to 28 U.S.C. § 2201, *et seq.*

3. An actual justiciable controversy exists between the Plaintiffs and the Defendants Tribe, Tribal Council and the Secretary of the Interior as to the constitutionality, legality, and applicability of the Jicarilla Oil and Gas Severance Tax.

WHEREFORE Plaintiffs request that this Court declare that the Plaintiffs are in no way liable for any amount alleged to be due under the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit B, that the Jicarilla Apache Tribal Council was without legal authority to issue such ordinance, and the Defendant Velarde is without legal authority to collect such tax, that the Secretary of the Interior's approval of such ordinance was unlawful and unconstitutional, that such ordinance is void and of no effect, and that the Jicarilla Apache Tribe lacks legal power and authority to impose any nature of tax upon or with respect to oil and gas production from reservation lands.

COUNT XI

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. In the event the Jicarilla Oil and Gas Severance Tax is held to be valid and applicable to these Plaintiffs, then one or more of the taxes levied and collected by the Defendant Martinez, as described in paragraph 6 of Count I of this Complaint, is invalid for one or more of the following reasons:

A. If the Jicarilla Oil and Gas Severance Tax is held to be valid notwithstanding 25 U.S.C. §§ 398 and 398(c), or upon a determination that 25 U.S.C. §§ 398 and 398(c) are

invalid, then the state taxes authorized, levied and collected by reason of 25 U.S.C. §§ 398 and 398(c) are invalid.

B. In the event the Jicarilla Oil and Gas Severance Tax is held to be valid by reason of a determination that the Tribe and Tribal Council possess the power to levy and collect a tax upon the severance of natural resources from lands located within the Executive Order Reservation of the Tribe, then the attempt to levy and collect such taxes by the State of New Mexico may be invalid.

3. In the event the Jicarilla Oil and Gas Severance Tax is held to be valid and applicable to these Plaintiffs, and by reason thereof one or more of the state taxes specified in paragraph 6 of Count I of this Complaint are held to be invalid, then the Defendant Martinez is and will be acting in excess of lawful authority and jurisdiction and in violation of the Constitution or laws of the United States in attempting to levy, collect and enforce such state taxes.

4. An actual justiciable controversy exists between the Plaintiffs and the Defendant Martinez as to the constitutionality, legality and applicability of the state taxes described in paragraph 6 of Count I of this Complaint, in the event the Jicarilla Oil and Gas Severance Tax should be held valid and applicable to these Plaintiffs.

5. Plaintiffs are entitled to a declaratory judgment determining the constitutional and statutory rights of the Plaintiffs and the Defendant Martinez pursuant to 28 U.S.C. § 2201, *et seq.*

WHEREFORE Plaintiffs request, in the event that the Jicarilla Oil and Gas Severance Tax should be held valid and applicable to these Plaintiffs, that this Court determine and declare the rights of the Plaintiffs and the Defendant Martinez with respect to the state taxes described in paragraph 6 of Count I of this Complaint.

COUNT XII
(Interpleader)

1. Plaintiffs incorporate the allegations of Counts I through XI of this Complaint by reference as though fully set forth herein.

2. Plaintiffs produce oil and gas from the leases held by them on lands within the Executive Order Reservation of the Tribe. The majority of production from such leases is gas. The gas produced from such leases is sold in interstate commerce and is subject to price regulation by federal authorities.

3. Under its agreements with the purchasers of gas produced from such leases, and subject to the regulations and orders of the Federal Power Commission, Plaintiffs are entitled to seek to pass on to such purchasers such taxes of the nature of the Jicarilla Oil and Gas Severance Tax on gas or the state taxes on gas described in paragraph 6 of Count I of this Complaint.

4. If the Jicarilla Oil and Gas Severance Tax should be held invalid, the only means available to Plaintiffs to recover such taxes if the same had been paid to the Tribe would consist of the refund and protest procedures set forth in Sections 11 and 12 of the Jicarilla Oil and Gas Severance Tax, a copy of which is attached hereto as Exhibit B. For the reasons stated in paragraph 16 of Count I, such remedy is inadequate in that Section 11 of the Jicarilla Oil and Gas Severance Tax allows the Tribe to make any refund in the form of a credit against future tax payments. Accordingly, Plaintiffs have filed this action seeking injunctive relief against the enforcement and collection of the Jicarilla Oil and Gas Severance Tax.

5. Amounts paid to the State of New Mexico pursuant to the taxes described in paragraph 6 of Count I, if invalid, may be recovered by Plaintiffs by paying the same under protest and filing actions in the Santa Fe County District Court of the State of New Mexico for refund. As Plaintiffs cannot know with

certainty at this time whether or not the Jicarilla Oil and Gas Severance Tax will be held invalid, and whether or not as a consequence thereof one or more of the state taxes may be held invalid, Plaintiffs will pay such applicable state taxes (for the period commencing April 1, the effective date of the Jicarilla Oil and Gas Severance Tax) under protest and will file refund actions in the Santa Fe County District Court.

6. Plaintiffs are required to take such actions in order to avoid irreparable loss, for the reason that if Plaintiffs voluntarily paid, without protest or refund action, the Jicarilla Oil and Gas Severance Tax and the state taxes and were able to pass the same on to their purchasers, and if any portion of such taxes should later be held invalid, if Plaintiffs are required to refund the same to their purchasers, Plaintiffs may be unable to recover such erroneous and illegal payments from the State or the Tribe. Therefore, in order to protect Plaintiffs from an irreparable loss, Plaintiffs have filed this action seeking injunctive relief against enforcement and collection of the Jicarilla Oil and Gas Severance Tax, and will protest the payment of the taxes levied by the State of New Mexico upon the same activity sought to be taxed by the Jicarilla Oil and Gas Severance Tax and seek refund of such taxes.

7. Plaintiffs stand ready, willing and able to pay any and all taxes which this Court should determine are valid and legal and applicable to Plaintiffs.

8. For the reasons stated in Count XI above, and because the Jicarilla Oil and Gas Severance Tax and the state taxes stated in paragraph 6 of Count I seek to tax the same activity, the claims of the Tribe for the Jicarilla Oil and Gas Severance Tax and the claims of Defendant Martinez for state taxes, for any period after April 1, 1977, are such that Plaintiffs are or may be exposed to double or multiple liability.

9. In the event the claims of the Tribe for the Jicarilla Oil and Gas Severance Tax and the claims of the Defendant Martinez for the state taxes were to be paid, Plaintiffs would be compelled to make double payments in connection with a single liability.

10. In order to avoid the possibility of such double or multiple liability and in order to avoid the possibility of inconsistent determinations as to the validity of either the Jicarilla Oil and Gas Severance Tax or the state taxes, Defendants Tribe, Tribal Council, Velarde, and Martinez should be required to interplead their claims for taxes due upon severance of oil and gas by Plaintiffs from lands within the Executive Order Reservation of Tribe on and after April 1, 1977.

11. In order to preserve the rights of all parties *pendente lite*, further proceedings in the state court refund actions to be filed by Plaintiffs should be stayed pending final determination by this Court as to the validity of the taxes. In addition, Plaintiffs should be required or permitted to post sufficient security, or pay into Court, any and all state taxes which may be due for severance by Plaintiffs of oil and gas from lands within the Executive Order Reservation of the Tribe pending final determination of this action, and if the Court should determine that Plaintiffs are not entitled to injunctive relief against enforcement and collection of the Jicarilla Oil and Gas Severance Tax pending final judgment herein, then Plaintiffs should be required or permitted to post sufficient security or pay such taxes into Court pending final judgment herein.

WHEREFORE, Plaintiffs pray as follows:

A. That the Court enter its Order requiring the Defendants Tribe, Tribal Council, Velarde, and Martinez to interplead their claims to taxes due on and after April 1, 1977, for the severance of oil or gas by Plaintiffs from lands within the Executive Order Reservation of the Tribe;

B. That upon such interpleader and after final hearing, that the Court determine which of such taxes are due and owing by Plaintiffs and enter an Order binding upon all Defendants in respect thereto;

C. That upon the filing of an appropriate Motion by Plaintiffs, Plaintiffs be required or permitted to post sufficient security or deposit into Court taxes which may become due for such taxes during the pendence of this action; and

D. For such other relief as the Court deems proper.

R. H. LANDT, ESQ.
Amoco Production Company
Security Life Building
Denver, Colorado 80202

RICHARD L. MARLAR, ESQ.
Marathon Oil Company
Findlay, Ohio 45840

MODRALL SPERLING ROEHL
HARRIS & SISK
P.O. Box 2168
Albuquerque, New Mexico 87103
(505) 243-4511

By_____
John R. Cooney
Attorneys for Plaintiffs

EXHIBITS OMITTED IN PRINTING

Exhibit A — Oil and Gas lease dated Dec. 4, 1953, Tract #251, in same form as Exhibit B to Complaint of Merrion, et al, No. 77-292-P. The special stipulations to the subject Oil and Gas leases are printed, *infra,* as part of Exhibit A to the Complaint in No. 77-343-P. [These special stipulations were part of the Oil and Gas lease attached to the Complaint in No. 77-292-P but were not filed with the same in the record below.]

Exhibit B — Jicarilla Apache Tribal Oil and Gas Severance Tax Ordinance and Instructions. Attached as Exhibits C and D to Complaint of Merrion, et al, No. 77-292-P.

[Exhibit A to Complaint in No. 77-343-P.]

Jicarilla Tribal Land — Oil and Gas Lease

SPECIAL STIPULATIONS

A. If so required by the Superintendent, the lessee shall condition under the direction of the Supervisor, United States Geological Survey, any wells drilled which do not produce oil or gas in paying quantities as determined by the said Supervisor, but are capable of producing water satisfactory for domestic, agricultural, or livestock use, in such manner as to make the best and largest quantity of water available for use by the lessors. Adjustment of cost for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

B. The lessee shall employ available Jicarilla Indian labor in all positions for which they are qualified, including truck driving, and shall protect the Indian farming and grazing rights to the surface of the lands.

C. The lessee will be required to execute a Forest and Land Protection Stipulations as part of this lease. Copy attached.

The foregoing stipulations are hereby acknowledged and made a part of oil and gas lease Contract No. Jicarilla Apache Tribal 154 executed December 4, 1951 covering Tract No. 251.

Lessee: THE OHIO OIL COMPANY
Signature by: s/_____

Lessor: _____
(Initial)

Title: _____

ATTEST: s/_____
Assistant Secretary

Jicarilla Tribal Lands

FOREST LAND PROTECTION STIPULATION

The land embraced in this lease issued under the Act of May 11, 1938, (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation, the lease hereby agrees:

(1) *Protection of Property.* To conduct all operations authorized by this lease with due regard to preventing damage to vegetation, timber, soil, crops, roads and improvements, and preventing water and soil pollution and also to restore the land wherever disturbed by necessary operations to its original condition at the completion of operations as determined by the Superintendent or his authorized representative. To fence all sump holes and other excavations made by lessee's operation whenever required in writing by the Superintendent or his authorized representative.

(2) *Reimbursement for Damage.* To reimburse the lessor for any and all damage to destruction of property of the lessor caused by lessee's operations hereunder and not authorized by this lease: to save and hold the lessor harmless from all damages or claims for damage to persons or property resulting from lessee's operations under this lease; to hold lessor, the leased land and all materials, tools, machinery, appliances, structures, improvements, and equipment of whatsoever kind or nature, placed in or upon the leased land by the lessee or at his direction, harmless from all claims or liens of third parties by reason of any act of commission or omission on the part of lessee; and where the surface of the leased land is owned by other than the lessor, to pay such owner, or his tenant, as the case may be, for damage or injury to livestock, crops, trees, pipe lines, buildings, and other improvements on the leased land.

(3) *Construction and Location of Roads.* All roads constructed by the lessee to obtain access to his leasehold or for other purposes will only be permitted when authorized in writing

by the Superintendent or his authorized representative, and all due precautions will be taken to keep such roads from developing into washes and resultant loss of soil. Be it further understood that if requested by the Superintendent or his authorized representative, such roads will be restored to their original vegetated condition insofar as possible.

(4) *Use of Timber on Land.* Not to cut or destroy timber owned by the lessor without first obtaining permission from the Superintendent or his authorized representative, and to pay for all such timber cut or destroyed at current local stumpage rates prescribed by such officer.

(5) *Fire Prevention and Suppression.* (a) To do all in his power to prevent and suppress forest, brush, or grass fires on the leased land and in its vicinity, and to require his employees of contractors or subcontractors to do likewise. Unless prevented by circumstances over which he has no control, the lessee shall place his employees, contractors, subcontractors, and employees of contractors and subcontractors employed on the lease land at the disposal of any authorized officer of the Department of the Interior for the purpose of fighting forest, brush, or grass fires, with the understanding that payment for such services shall be made at rates to be determined by the officer in charge, which rates shall not be less than the current rates of pay prevailing in the vicinity for services of a similar character; Provided, that if the lessee, his employees, contractors, subcontractors, or employees of contractors or subcontractors, caused or could have prevented the origin or spread of the said fire or fires, no payment shall be made for services so rendered.

(b) During periods of serious fire danger to forest, brush, or grass, as may be specified by the Superintendent, or his authorized representative, the lessee shall prohibit smoking and the building of camp and lunch fires by his employees, contractors, subcontractors, and employees of contractors or subcontractors within the leased area except at established camps,

and shall enforce this prohibition by all means within his power; Provided, that the Superintendent or his authorized representative may designate safe places where, after all inflammable material has been cleared away, camp fires may be built for the purpose of heating lunches and where, at the option of the lessee, smoking may be permitted.

(c) The lessee shall not burn rubbish, trash, or other flammable material except with the consent of the Superintendent or his authorized representative and shall not use explosives in such manner as to scatter inflammable materials on the surface of the land during the forest, brush, or grass fire season, except as authorized to do so on areas approved by such officer.

(d) The lessee shall build or construct such fire lines or do such clearing as the Superintendent or his authorized representative decides is necessary for forest, brush, and grass fire prevention, and shall maintain such fire tools at his headquarters on the leased land as are deemed necessary by such officer.

(6) *Location of Camp Site.* If lessee shall construct any camp on the land within the Jicarilla Indian Reservation, such camp shall be located at the place approved by the Superintendent or his authorized representative, and such officer shall have authority to require that such camp be kept in a neat and sanitary condition.

(7) The foregoing stipulations are hereby made a part of Oil and Gas Lease executed December 4, 1956 covering TRACT No. 251.

Lessee: THE OHIO OIL COMPANY
By: s/_____

Lessor:_____ Title: Vice-President
ATTEST: s/_____

ANSWER,
JICARRILLA APACHE TRIBE, ET AL.,
CASE NO. 77-292-P. (MERRION)

[Caption, Civil No. 77-292-P Omitted in Printing]

ANSWER
(Filed July 1, 1977)

COMES NOW the Defendants JICARILLA APACHE TRIBE, and JICARILLA TRIBAL COUNCIL, by their attorneys, Nordhaus, Moses & Dunn, and for their answer to Plaintiffs' Complaint state:

FIRST CAUSE OF ACTION

1. These Defendants are without sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 1 through 17 and therefore deny the same.

2. These Defendants admit the allegations of Paragraphs 18, 19, 20 and 21.

3. In response to paragraph 22, Defendants deny that this action arises under Article I, Section 8, Clause 3 of the United States Constitution or 25 U.S.C. § 398c or 5 U.S.C. § 706. Defendants admit that federal question jurisdiction is conferred on this Court by 28 U.S.C. § 1331.

4. In response to Paragraph 23, Defendants admit that the Tribe is the beneficial owner of the royalty interest created by oil and gas leases which were sold by the Secretary of the Interior pursuant to 25 U.S.C. §398 and 25 U.S.C. §396. Defendants deny that they consented to these leases because the Tribal Council was not fully informed as to the legal and environmental implications regarding some of these leases.

5. In response to Paragraph 24, Defendants deny that any oil and gas leases are referred to in Paragraph 22 of Plaintiffs' Complaint and also deny that Exhibit "A" to Plaintiffs' Complaint is correct because Defendants have insufficient information to form a belief as to the truth of the allegations therein.

Defendants further deny that Exhibit "B" to Plaintiffs' Complaint is a copy of the lease form typically used because it omits the special Stipulations included in these leases.

6. In response to Paragraph 25, Defendants admit that the Tribe adopted a Revised Constitution, including provisions for taxation, but Defendants deny that they acted without lawful authority or procedure or that said Constitution was adopted on or about November 22, 1968. Defendants state affirmatively that the *Revised Constitution* of the Jicarilla Apache Tribe was duly adopted by the Tribe on December 23, 1968 and duly approved by the Undersecretary of the Interior on February 13, 1969.

7. In response to Paragraph 26, Defendants admit that the Revised Constitution adopted by the Tribe on December 23, 1968, was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969, but Defendants deny that his approval was without due consideration. Defendants state affirmatively that no hearing is required by law prior to the Secretary's, or his delegated representative's, approval of a tribal constitution.

8. In response to Paragraph 27, Defendants admit that the Tribal Council, on or about July 9, 1976, adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, (Exhibit "C" to the Complaint) but Defendants deny that the Tribal Council acted without lawful authority. Defendants state affirmatively that the Tribal Council acted with full constitutional authority when adopting said ordinance.

9. In response to Paragraph 28, Defendants admit that the Jicarilla Oil and Gas Severance Tax Ordinance was approved by the Secretary of the Interior of the United States on or about December 23, 1976, but Defendants deny that the Secretary acted without due consideration. Defendants state affirmatively that no hearing is required by law prior to the approval by the Secretary, or his delegated representative, of a Tribal Council Ordinance.

10. Defendants admit the allegations contained in Paragraph 29 of Plaintiffs' Complaint.

11. Defendants deny each and every allegation contained in Paragraphs 30, 31, and 32 of Plaintiffs' Complaint.

SECOND CAUSE OF ACTION

1. In response to Paragraph 1, these Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. In response to Paragraph 2, these Defendants admit that the Jicarilla Oil and Gas Severance Tax applies only to oil and gas "produced on the Jicarilla Apache Reservation" but deny that said tax is discriminatory as to Plaintiffs or that such tax denies Plaintiffs the equal protection of law. Defendants state affirmatively that the Defendant Tribal Council only has authority over activities within the boundaries of the Jicarilla Apache Reservation and therefore cannot tax production outside its jurisdiction.

3. In response to Paragraph 3, these Defendants admit that the Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax Ordinance, but deny that the Plaintiffs were denied the equality of law guaranteed them by the Fifth Amendment to the United States Constitution. Defendants state affirmatively that the Fifth Amendment to the United States Constitution does not apply to Indian Tribes and therefore Plaintiffs fail to state a claim upon which relief can be granted.

4. Defendants deny each and every allegation contained in Paragraph 4 of Plaintiffs' Second Cause of Action. Defendants state affirmatively that Plaintiffs were not denied equal protection under the Indian Civil Rights Act because the tax is not discriminatory between producers or purchasers of natural gas and oil doing business on the Reservation.

THIRD CAUSE OF ACTION

1. In response to Paragraph 1, these Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants deny each and every allegation contained in Paragraphs 3 and 4 of Plaintiffs' Third Cause of Action.

FOURTH CAUSE OF ACTION

1. In response to Paragraph 1, these Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants deny each and every allegation contained in Paragraphs 2, 3 and 4 of Plaintiffs' Fourth Cause of Action. Defendants state affirmatively that Plaintiffs have failed to set forth in their Fourth Cause of Action why the Secretary's approval of the tax was arbitrary, capricious and not in accordance with law. Therefore, Plaintiffs' fail to state a claim upon which relief can be granted.

FIFTH CAUSE OF ACTION

1. In response to paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants deny each and every allegation contained in Paragraphs 2, 5 and 7 of Plaintiffs' Fifth Cause of action. Defendants state affirmatively that 25 U.S.C. § 398(c) does not specifically pre-empt taxation by the Tribe in favor of the State of New Mexico and such pre-emption cannot be read into the statute by implication. There is no statute which "requires" the State to impose a severance tax to fund state governmental services to the Tribe and in fact, the state provides only limited services to the Tribe and its members. 25 U.S.C. § 321 cited by Plaintiffs does not obligate the State to provide such services. By the terms of the Indian Reorganization Act, the Tribe has Congressional authorization to tax and the Tribe's severance tax

does not conflict with the tax as levied by the State of New Mexico.

3. Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 3, 4 and 6 of Plaintiffs' Fifth Cause of Action and therefore deny the same.

SIXTH CAUSE OF ACTION

1. In response to Paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. In response to Paragraph 2, Defendants admit that in 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. 476-477, however Defendants deny each and every other allegation contained in Paragraph 2 of Plaintiffs' Sixth Cause of Action. Defendants state affirmatively that the Act recognized the Tribe's power of taxation by including "all powers vested in any Indian tribe or tribal council by existing law . . ." Plaintiffs' allegation that the only powers reserved were those which had been "exercised" by the Tribe is unfounded.

3. Defendants deny each and every allegation contained in Paragraph 3 of Plaintiffs' Sixth Cause of Action.

SEVENTH CAUSE OF ACTION

1. In response to Paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants admit the allegations of Paragraphs 2 and 3 of Plaintiffs' Seventh Cause of Action.

3. Defendants deny each and every allegation contained in Paragraphs 4 and 5 of Plaintiffs' Seventh Cause of Action. Defendants state affirmatively that the tax is not discriminatory because the only exemption is for Tribal use as a governmental function. All other gas leaves the Reservation and is subject to

the tax, even that gas which is sold and returns for individual or business consumption on the Reservation.

EIGHTH CAUSE OF ACTION

1. In response to Paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants admit that 28 U.S.C. § 2201 *et seq.* provides for a Declaratory Judgment.

3. Defendants deny each and every allegation contained in Paragraph 3 of Plaintiffs' Eighth Cause of Action.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of laches. By waiting until fifteen days before the effective date of the tax to serve Defendants with Summons and Complaint after having notice of the tax for over three months, Plaintiffs are guilty of an "inexcusable delay in asserting a right." Hoehn v. Crews, (CCA Okla.) 144 F.2d 665, 671, cert denied, 65 S. Ct. 132, 323 U.S. 773, 89 L.Ed. 618 (1944).

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of clean hands in that Plaintiffs have not paid royalties to the Defendants in a timely manner; Plaintiffs have not employed or trained Tribal members in their operation on the Reservation; Plaintiffs have not properly accounted to Defendants for royalties on gas and liquid hydrocarbon substances; and Plaintiffs have in some cases not fully reported production, all in contravention of the terms of their leases.

WHEREFORE, Defendants pray that this Court dismiss Plaintiffs' Complaint with prejudice and award Defendants' attorneys' fees, costs, interest and such other and further relief as is just and proper.

Respectfully submitted,
NORDHAUS, MOSES & DUNN

By TERRY D. FARMER

Terry D. Farmer
800 American Bank of
Commerce Complex
200 Lomas Boulevard NW
Albuquerque, New Mexico
87102
(505) 843-9440
Attorneys for Defendants
Jicarilla Apache Tribe

This is to certify that a copy of the foregoing Answer was mailed to all opposing counsel on this 5th day of July, 1977.

TERRY D. FARMER

ANSWER,
JICARILLA APACHE TRIBE, ET AL.,
CASE NO. 77-343-P. (AMOCO)

PREVIOUS PAGE WAS BLANK

[Caption, Civil No. 77-343-P Omitted in Printing]

ANSWER
(Filed July 21, 1977)

COMES NOW the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, by their attorneys Nordhaus, Moses and Dunn, and for their answer to Plaintiffs' Complaint state:

COUNT I

1. Defendants are without sufficient information to form a belief as to the truth of the allegations contained in paragraphs 1 and 2 and therefore deny the same.

2. These Defendants admit the allegations in paragraph 3.

3. In response to paragraph 4, these Defendants admit that the legislative powers of the Jicarilla Apache Tribe reside in the Jicarilla Apache Tribal Council, and that Gwendolyn Velarde is Treasurer of the Jicarilla Apache Tribe, but deny that Gwendolyn Velarde is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax.

4. These Defendants admit the allegations of paragraph 5.

5. In response to paragraph 6 these Defendants are without sufficient information to form a belief as to the truth of the allegations and therefore deny the same.

6. These Defendants admit the allegations of paragraph 7.

7. In response to paragraph 8, these Defendants admit that federal question jurisdiction is conferred on this Court by 28 U.S.C. § 1331, but only because the Tribe has waived its immunity from suit in the Oil and Gas Severance Tax Ordinance No. 77-0-02 as amended by Ordinance No. 77-0-195. These Defendants deny each and every other allegation of paragraph 8.

8. In response to paragraph 9, these Defendants admit that the leases were granted by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 398, but deny that said leases were issued pursuant to 25 U.S.C. § 396.

9. These Defendants admit the allegations of paragraph 10.

10. In response to paragraph 11, Defendants admit that the Tribe adopted a Revised Constitution, including provisions for taxation, but Defendants deny that they acted without lawful authority or procedure or that such Constitution was adopted on or about November 22, 1968. Defendants state affirmatively that the Revised Constitution of the Jicarilla Apache Tribe was duly adopted by the Tribe on December 23, 1968, and duly approved by the Undersecretary of the Interior on February 13, 1969.

11. In response to paragraph 12, Defendants admit that the Revised Constitution adopted by the Tribe on December 23, 1968, was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969, but Defendants deny that his approval was without due consideration. Defendants state affirmatively that no hearing is required by law prior to the Secretary or his delegated representative's approval of a Tribal Constitution.

12. In response to paragraph 13, Defendants admit that the Tribal Council on or about July 9, 1976, adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, (Exhibit "B" to the Complaint) but Defendants deny that the Tribal Council acted without lawful authority. Defendants state affirmatively that the Tribal Council acted with full constitutional authority when adopting said Ordinance.

13. In response to paragraph 14, Defendants admit that the Jicarilla Oil and Gas Severance Tax Ordinance was approved by the Secretary of the Interior of the United States on or about December 23, 1976, but Defendants deny that the Secretary acted without due consideration. Defendants state affirmatively

that no hearing is required by law prior to the approval by the Secretary, or his delegated representative, of a Tribal Council ordinance.

14. Defendants admit the allegations contained in paragraph 15 of Plaintiffs' Complaint.

15. Defendants deny each and every allegation contained in paragraphs 16, 17 and 18 of Plaintiffs' Complaint.

COUNT II

1. In response to paragraph 1, these Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraph 2, these Defendants admit that the Jicarilla Oil and Gas Severance Tax applies only to oil and gas "produced on the Jicarilla Apache Reservation" but deny that said tax is discriminatory as to Plaintiffs or that such tax denies Plaintiffs the equal protection of law. Defendants state affirmatively that the Defendant Tribal Council only has authority over activities within the boundaries of the Jicarilla Apache Reservation and therefore cannot tax production outside its jurisdiction.

3. In response to paragraph 3, these Defendants admit that the Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax Ordinance, but deny that Plaintiffs were denied equality of law guaranteed them by the Fifth Amendment to the United States Constitution. Defendants state affirmatively that the Fifth Amendment to the United States Constitution does not apply to Indian tribes and therefore Plaintiffs failed to state a claim upon which relief can be granted.

4. Defendants deny each and every allegation contained in paragraph 4 of Count II. Defendants state affirmatively that Plaintiffs were not denied equal protection under the Indian Civil Rights Act, 25 U.S.C. § 1302 or Article II, § 18 of the New Mexico Constitution because the tax is not discriminatory

between producers or purchasers of natural gas and oil doing business on the Reservation.

COUNT III

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit the allegations of paragraph 2.

3. Defendant deny each and every allegation contained in paragraphs 3 and 4 of Count III.

COUNT IV

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants deny each and every allegation contained in paragraphs 2, 3 and 4 of Count IV. Defendants state affirmatively that Plaintiffs have failed to set forth any reasons why the Secretary's approval of the tax was arbitrary, capricious and not in accordance with law. Therefore, Plaintiffs fail to state a claim upon which relief can be granted.

COUNT V

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants deny each and every allegation contained in paragraphs 2, 5 and 7 of Plaintiffs' Count V. Defendants state affirmatively that 25 U.S.C. § 398(c) does not specifically preempt taxation by the Tribe in favor of the State of New Mexico, and such preemption cannot be read into the statute by implication. There is no statute which "requires" the State to impose a severance tax to fund state governmental services to the Tribe and in fact, the State provides only limited services to the

Tribe and its members. By the terms of the Indian Reorganization Act, the Tribe has Congressional authorization to tax. The Tribe's severance tax does not conflict with the taxes levied by the State of New Mexico. Nor is the severance tax contrary to the Commerce Clause of the United States Constitution as is shown elsewhere herein.

3. Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraphs 3, 4 and 6 of Count V and therefore deny the same.

COUNT VI

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraph 2, Defendants admit that in 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. § 476-477, however, Defendants deny each and every other allegation contained in paragraph 2 of Plaintiffs' Count VI. Defendants state affirmatively that the Act recognized the Tribe's power of taxation by including "all powers vested in any Indian Tribe or Tribal Council by existing law . . . ." Plaintiffs' allegation that the only powers reserved were those which had been "exercised" by the Tribe is unfounded.

3. Defendants deny each and every allegation contained in paragraph 3 of Count VI.

COUNT VII

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit the allegations of paragraphs 2 and 3 of Count VII.

3. Defendants deny each and every allegation contained in paragraphs 4 and 5 of Count VII. Defendants state affirmatively

that the tax is not discriminatory because the only exemption is for Tribal use as a governmental function. All other gas leaves the Reservation and is subject to the tax, even that gas which is sold and returns for individual or business consumption on the Reservation.

COUNT VIII

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit the allegations of paragraphs 2 and 3 but deny that a Revised Constitution of the Tribe was adopted on or about November 22, 1968. Defendants state affirmatively that the Revised Constitution of the Jicarilla Apache Tribe was duly adopted by the Tribe on December 23, 1968, and duly approved by the Undersecretary of the Interior on February 13, 1969.

3. In response to paragraph 4, Defendants are without sufficient information to form a belief as to the truth of the allegations therein and therefore deny the same.

4. Defendants deny each and every allegation of paragraph 5. Defendants state affirmatively that 25 U.S.C. §398(c) does not specifically grant states the exclusive right to levy taxes and such an exclusive right cannot be read into the statute by implication. Defendants state that the statute does not constitute a limitation upon the right or power of the Tribe to levy and collect taxes and no such limitation can be read into the statute by implication.

5. Defendants deny each and every allegation of paragraph 6. Defendants state affirmatively that the Jicarilla Oil and Gas Severance Tax is not contrary to the Amended Charter and Revised Constitution of the Tribe because there are no restrictions or limitations on the Tribe's sovereign taxing power imposed by the Constitution of the United States, any applicable

Federal statute or any regulation of the Department of the Interior.

6. Defendants deny each and every allegation of paragraph 7.

COUNT IX

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraph 2, Defendants state that the allegations therein constitute a legal conclusion which requires no answer. In the alternative, Defendants deny each and every allegation of paragraph 2.

3. In response to paragraph 3, Defendants state that the allegations therein set forth a legal conclusion for which no answer is required. In the alternative, Defendants admit that they consented to the presence of Plaintiffs on the Reservation for the exploration and development of oil and gas leases, but deny that they consented to the presence of Plaintiffs on the Reservation for any other purpose.

4. Defendants deny each and every allegation of paragraph 4. Defendants affirmatively state that Plaintiffs have failed to set forth in Count IX how they were denied any rights guaranteed them by the Indian Civil Rights Act, 25 U.S.C. §1302. Therefore, Plaintiffs failed to state a claim upon which relief can be granted.

COUNT X

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit that 28 U.S.C. §2201 *et seq.* provides for a declaratory judgment.

3. Defendants deny each and every allegation contained in paragraph 3 of Count X.

COUNT XI

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraphs 2, 3, 4 and 5, Defendants state that the allegations therein constitute legal conclusions for which no response is necessary. In the alternative, Defendants deny each and every allegation of paragraphs 2, 3, 4 and 5. Defendants state affirmatively that the oil and gas severance taxes of the Tribe and the State of New Mexico are not mutually exclusive. Defendants further state that if such taxes are mutually exclusive, the taxes levied by the State of New Mexico are invalid because the State of New Mexico has no right or power either under the New Mexico Enabling Act, 36 Stat. 557, 558-559 (1910) or the New Mexico Constitution to tax oil and gas production from the Jicarilla Apache Reservation.

COUNT XII

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit that Plaintiffs produce oil and gas from the Jicarilla Reservation and that the majority of such production is gas, but are without sufficient information to form a belief as to the truth of the remaining allegations contained in paragraph 2 and therefore deny the same.

3. In response to paragraph 3, Defendants state that the allegations therein are argumentative and therefore Defendants are not required to respond. In the alternative, Defendants are without sufficient information to form a belief as to the truth of the allegations therein and therefore deny the same.

4. In response to paragraph 4, Defendants state that the allegations therein are argumentative and therefore Defendants are not required to reply. In the alternative, Defendants deny each and every allegation of paragraph 4. Defendants state affirmatively that they have voluntarily waived immunity from suit for the purpose of determining the validity of this tax and that should the tax be held invalid, any monies paid to the Tribe would be refunded. Sections 11 and 12 of the Jicarilla Oil and Gas Severance Tax are only applicable to payments which are erroneously, not illegally, paid. Consequently full refund procedures are available and no injunctive relief should be granted.

5. In response to paragraph 5, Defendants state that the allegations therein are argumentative and that no response is required.

6. Defendants deny each and every allegation of paragraph 6. Defendants affirmatively state that no injunctive relief should be granted against these Defendants because no irreparable loss is possible. Defendants further state that Plaintiffs' arguments are without substance because the refund procedures for the Jicarilla Oil and Gas Severance Tax and the taxes by the State of New Mexico are exactly the same, yet Plaintiffs have not sought injunctive relief against the State of New Mexico.

7. These Defendants are without sufficient information to form a belief as to the truth of the allegations contained in paragraph 7 and therefore deny the same.

8. Defendants deny each and every allegation of paragraph 8. Defendants affirmatively state that there is nothing uncommon or illegal about double or multiple tax liability on a single transaction.

9. Defendants deny each and every allegation of paragraph 9. Defendants affirmatively state that Plaintiffs would not be compelled to make double payments in connection with a single

liability because there would be a single liability to the Tribe and a single liability to the State with a single payment on each.

10. Defendants deny each and every allegation of paragraph 10. Defendants affirmatively state that they should not be required to interplead their claim for taxes with the State of New Mexico because the taxes are not mutually exclusive.

11. In response to paragraph 11, Defendants state that the allegations therein are argumentative and therefore do not require an answer. Defendants affirmatively state that for Plaintiffs to pay into Court only the State taxes which may be due is inequitable without also paying into Court the Jicarilla Oil and Gas Severance Tax which may be due.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of Laches because, after having notice of the tax for over three months, Plaintiffs waited until the date the tax was due to file this action and therefore are guilty of an "inexcusable delay in asserting a right." *Hoehn v. Crews*, (CCA Okla.) 144 F.2d 665, 671, *cert denied*, 65 S. Ct. 132, 323 U.S. 773, 89 L.Ed. 618 (1944).

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of unclean hands in that Plaintiffs have violated the terms of their leases by failing to employ or train Tribal members in Plaintiffs' operations on the Reservation, failed to properly to account to Defendants for royalties on gas and liquid hydrocarbons substances, failed to pay royalties in a timely manner, and in some cases not fully reported production.

WHEREFORE, Defendants pray that this Court dismiss Plaintiffs' Complaint with prejudice and award Defendants attorneys'

fees, costs, interest and such other and further relief as is just and proper.

Respectfully submitted,
NORDHAUS, MOSES &
DUNN

By TERRY D. FARMER

Terry D. Farmer
800 American Bank of
Commerce Complex
200 Lomas Boulevard, NE
Albuquerque, New Mexico
87102
(505) 843-9440

This is to certify that a copy of the attached Answer was mailed to all opposing counsel on this 21st day of July, 1977.

TERRY D. FARMER

Note: The Complaint in Intervention of Mobil Oil Corporation and Oxy Petroleum Inc., and Answer thereto are essentially the same as the other pleadings in Case No. 76-292-P, Merrion, et al., v. Jicarilla Apache Tribe, and are therefore omitted from this Appendix.

ORDER TO CONSOLIDATE CASES 77-292-P,
CIVIL, AND 77-343-P, CIVIL

[Consolidated Caption Omitted in Printing]

ORDER TO CONSOLIDATE
(Filed August 3, 1977)

THIS MATTER having arisen sua sponte and the Court finding that good cause exists to consolidate these matters for trial, it is now, hereby

ORDERED, ADJUDGED AND DECREED that these cases be and they hereby are consolidated.

. . . . . .
THE HONORABLE
H. VEARLE PAYNE
U. S. District Court Judge

PRE-TRIAL ORDER
IN CONSOLIDATED CASES

PREVIOUS PAGE WAS BLANK

[Consolidated Caption Omitted in Printing]

PRE-TRIAL ORDER

(Filed August 19, 1977)

This matter having come before the Court on August 5, 1977, at pretrial conference held before The Honorable H. Vearle Payne, United States District Judge, pursuant to Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.; and Jack M. Campbell, Esq. and Jason W. Kellahin, Esq. having appeared as counsel for Plaintiffs Merrion and Bayless, et al., and John R. Cooney, Esq. and Mark B. Thompson, III, Esq. having appeared as counsel for Plaintiffs Amoco and Marathon and Terry D. Farmer, Esq. and Robert J. Nordhaus, Esq. having appeared as counsel for Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council and Defendant Velarde in No. 77-343-P, and James B. Grant, Esq. having appeared as counsel for Defendant Cecil Andrus, Secretrary of the Interior and Albert L. Pitts, Esq., Assistant Attorney General, having appeared as counsel for Defendant Martinez in No. 77-343-P; the following action was taken:

1. **JURISDICTION AND PARTIES:** No. 77-292-P and Counts I through X of No. 77-343-P are actions for a permanent injunction against Defendants prohibiting Defendants from taking any action whatsoever to enforce or facilitate the collection of the Jicarilla Oil and Gas Severance Tax imposed by Jicarilla Tribal Council Ordinance No. 77-0-02 as amended and for an order declaring that Plaintiffs are in no way liable for any amount alleged to be due under the Jicarilla Oil and Gas Severance Tax, that the Tribal Council was without legal authority to issue such ordinance, that if the Secretary of the Interior has approved this amended ordinance, such approval was unlawful and unconstitutional, and that the ordinance is void and of no effect. The jurisdiction of the Court is invoked under Article I, Section 8, Clause 3 of the United States Constitution; the Fifth

Amendment to the United States Constitution, and 5 U.S.C. Sec. 706. The Jicarilla Apache Tribe, pursuant to resolution of the Jicarilla Apache Tribal Council, waives any claim to sovereign immunity for the determination of the legal validity of this tax. The jurisdiction of the Court to determine validity of approval of the Jicarilla Tribal Council Ordinance No. 77-0-02 as amended is questioned by the Secretary of the Interior. There is no remaining question as to the propriety of the parties in No. 77-292-P and Counts I through X of 77-343-P.

Counts XI and XII of No. 77-343-P are an action for declaratory judgment against the Defendant Martinez for a determination that if the Jicarilla Oil and Gas Severance Tax is held to be valid and applicable to Plaintiffs, then the state taxes described in the Complaint are invalid and the Defendant Martinez is without authority to enforce and collect such taxes, and for interpleader to order the Defendant Martinez and the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde and Cecil Andrus to interplead their claims for taxes due or alleged to be due upon severance of oil or gas by Plaintiffs from lands within the Executive Order Reservation of the tribe. Jurisdiction is invoked under Article I, Section 8, Clause 3 of the United States Constitution; Article II, Section 2 of the United States Constitution; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; 25 U.S.C. §§476 and 477; 25 U.S.C. §1301, *et seq.;* 25 U.S.C. §398(c); 42 U.S.C. §1983; and 5 U.S.C. §706.

2. GENERAL NATURE OF THE CLAIMS OF THE PARTIES:

(a) Plaintiffs Merrion and Bayless, et al., Plaintiffs in Cause No. 77-292-P CIV, claim:

(1) The Defendants have deprived Plaintiffs of the due process of law by imposing and/or approving such a discriminatory tax without notice to or the opportunity for hearing by the Plaintiffs.

(2) In enacting, adopting, approving and/or implementing the Jicarilla Oil and Gas Severance Tax the Defendants denied the Plaintiffs the equal protection of law guaranteed them by the Fifth Amendment to the United States Constitution and by the Indian Civil Rights Act, 25 U.S.C. Sec. 1302, and by Article II, Section 18, of the New Mexico Constitution.

(3) The Secretary of the Interior contractually promised in the leases that he would approve no regulation effecting a change in the rate of royalty. If he approved the Jicarilla Severance Tax the Secretary of the Interior breached the express provisions of Plaintiffs' leases.

(4) If the Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax such approval was arbitrary, capricious, not in accordance with law, contrary to constitutional right, in excess of his statutory jurisdiction, and in breach of his express contractual promises to the Plaintiffs without observance of the procedure required, all in violation of the Administrative Procedure Act, 5 U.S.C. Sec. 701.

(5) In 25 U.S.C. Sec. 398 and 398(c) Congress gave the various states the exclusive right, power and authority to levy taxes upon the output of oil and gas wells upon all lands within Executive Order Indian reservations. The Jicarilla Apache reservation is an Executive Order Indian reservation and thus the Jicarilla Oil and Gas Severance Tax is expressly preempted by 25 U.S.C. Sec. 398 and 398(c).

(6) In 1934 Congress enacted the Indian Reorganization Act, 25 U.S.C. Sec. 476-477. The Jicarilla Apache Tribe is organized and incorporated under the Indian Reorganization Act. In the Indian Reorganization Act Congress expressly enumerated the powers which an Indian tribe choosing to be incorporated under that Act could exercise. The power of taxation was not enumerated in the Indian

Reorganization Act and is therefore denied a tribe such as the Jicarilla Apache Tribe which had not exercised such power prior to the adoption of the Indian Reorganization Act.

(7) The Jicarilla Severance Tax applies only to oil and gas produced on the Jicarilla Apache reservation and sold or transported off the reservation. By exempting gas which is consumed on the Jicarilla Apache Reservation the Jicarilla Severance Tax unfairly discriminates against interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

(8) The Secretary of the Interior did not personally expressly approve the Jicarilla Oil and Gas Severance Tax as is expressly required by the 1968 Revised Constitution of the Jicarilla Apache Tribe.

(9) The failure of the official area director of the Bureau of Indian Affairs to approve the Jicarilla Oil and Gas Severance Tax violates federal regulations.

(b) Plaintiffs Amoco Production Company (Amoco) and Marathon Oil Company (Marathon), Plaintiffs in No. 77-343-P, claim:

(1) The first seven counts of the Complaint in No. 77-343-P seek the same relief and make the same claims against the Defendants Jicarilla Apache Tribe and Cecil Andrus, Secretary of the Interior, as the first seven causes of action in No. 77-292-P.

(2) In addition Amoco and Marathon make their claims concerning the validity of the Jicarilla Oil and Gas Severance Tax against Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe. Amoco and Marathon claim that Defendant Velarde is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax and is without power or authority to enforce or collect such tax by reason of the invalidity of the tax.

(3) In addition Amoco and Marathon claim that the Jicarilla Oil and Gas Severance Tax is illegal for the following three additional reasons not claimed in the Complaint in No. 77-292-P:

a. Adoption and enactment of the Jicarilla Oil and Gas Severance Tax is contrary to the Amended Charter and Revised Constitution of the Jicarilla Apache Tribe.

b. The right or power, if any, of the Jicarilla Apache Tribe to levy and collect taxes may be exercised only to exclude non-members from the Reservation. By consenting to the issuance of oil and gas leases to Amoco and Marathon, the Tribe has consented to their presence on the Reservation. Any attempt to levy and collect additional taxes denies Amoco and Marathon rights guaranteed them by the Indian Civil Rights Act, 25 U.S.C. Sec. 1302.

c. The Secretary of the Interior did not approve enactment of the Jicarilla Oil and Gas Severance Tax.

(4) In addition, Amoco and Marathon claim as against the Defendant Tony Martinez, Executive Director, New Mexico Oil and Gas Accounting Commission, that such Defendant is responsible for the enforcement and collection of various taxes levied by the State of New Mexico upon production of oil or gas by Amoco and Marathon from leases held by them upon lands within the Jicarilla Apache Reservation. Amoco and Marathon seek a declaratory judgment that if the Jicarilla Oil and Gas Severance Tax is held to be valid, notwithstanding 25 U.S.C. Sec. 398(c), the state taxes levied and collected by the Defendant Martinez are invalid and Defendant Martinez is without power or authority to collect the same, for one or more of the following reasons:

a. If the Jicarilla Apache Tribe is authorized to levy and collect taxes upon the severance of oil or gas from leases within the Jicarilla Apache Reservation notwithstanding 25 U.S.C. Sec. 398(c), then 25 U.S.C. Sec. 398(c) does not permit Defendant Martinez to levy and collect taxes upon such production and Defendant Martinez is otherwise without authority to levy and collect such taxes.

b. The state taxes described above constitute an unconstitutional burden upon interstate commerce in that

such taxes create a risk of multiple taxation upon interstate commerce.

(5) In addition Amoco and Marathon claim that because the Jicarilla Oil and Gas Severance Tax and the state taxes described above seek to tax the same activity, the claims of the Tribe and the Defendant Martinez are such that Amoco and Marathon are or may be exposed to double or multiple liability, Plaintiffs may be compelled to make double payments in connection with a single liability, and, therefore, the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Velarde and Martinez should be required to interplead their claims for such taxes. The claims of Amoco and Marathon for declaratory judgment against the Defendant Martinez and for interpleader will not be tried in the hearing commencing August 29, 1977 but will be reserved for later determination.

(c) Defendant Cecil Andrus, Secretary of the Interior, claims:

That this Court is without jurisdiction to entertain this action against the Secretary;

That the severance tax ordinance enacted by the Jicarilla Apache Tribe is within its governmental authority and does not derive from Congressional authorization;

That the Secretary's action, under properly delegated authority, is not reviewable as timely appeal was not taken as prescribed by 25 C.F.R. 2.10, and

That this controversy is not justiciable by reason of the Tribe's sovereign immunity.

(d) Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council claim:

1. Plaintiffs have not been deprived of due process of law as the result of approval of the Severance Tax Ordinance and/or imposition of the severance tax by the Tribe without notice or the opportunity to be heard. The Plaintiffs do not have the right to notice or hearing prior to enactment of legislation by the Tribal Council; further, the Tribal Council meetings discussing and approving said tax

were public meetings, at which the Plaintiffs had the opportunity to be heard.

2. The Fifth Amendment of the United States Constitution and Article II, Section 18, of the New Mexico Constitution do not apply to Indian Tribes, therefore Plaintiffs were not denied the equal protection of law guaranteed by said Fifth Amendment. Furthermore, Defendants did not deny Plaintiffs the equal protection of law guaranteed them by the Indian Civil Rights Act, 25 U.S.C., 1302.

3. The Tribal severance tax is not a royalty, therefore the approvals of the severance tax by the Tribe and the Secretary of Interior do not change the royalty rate.

4. The Secretary of Interior is not required by law to notify Plaintiffs or grant Plaintiffs a hearing prior to approval of Tribal Ordinances, including the Tribal severance tax ordinance; therefore, the Secretary of Interior did not violate the Administrative Procedure Act, 5 U.S.C. 702, in approving the Tribal severance tax ordinance.

5. 25 U.S.C., Section 398 and 398(c) grants to states and local authority the right to levy taxes on the output of oil and gas wells on lands within Executive Order Indian Reservations. The authority of the state to tax the output of oil and gas wells is not exclusive of the right of the Tribe to levy its severance tax.

6. The power to tax is an inherent attribute of the tribal sovereignty of the Jicarilla Apache Tribe which is not limited in any way by the Indian Reorganization Act, 25 U.S.C., Sections 476-477.

7. The Jicarilla Apache severance tax applies to all oil and gas produced and sold or transported off the Reservation. All of the oil and gas produced on the Jicarilla Apache Reservation except that used for drilling and production activities is sold or transported off the Reservation. There is no discrimination against interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution because there is no exempt oil or gas produced. Furthermore, the only exemption provided by the Ordinance is the exemption of royalty gas, oil or condensate

taken by the Tribe in kind, and used by the Tribal Government.

8. The approval of the Acting Area Director, Albuquerque Area Office, Bureau of Indian Affairs, of the Jicarilla Oil and Gas Severance Tax Ordinance, constituted approval of the tax by the Secretary of Interior, and was consistent with law and federal regulations. Furthermore, the said severance tax ordinance of the Tribe became legally effective without approval of the Secretary of the Interior or his authorized delegate as provided by Article XI, Section 2, of the Tribal Constitution.

9. Adoption and enactment of the Jicarilla Apache Oil and Gas Severance Tax is consistent with the Tribe's sovereign taxing power, the Charter of 1937, the Constitution of 1937, the Constitution of 1960 and the Revised Constitution of 1968 of the Jicarilla Apache Tribe which specifically grants to the Tribe the power to impose taxes upon non-Indians doing business on the Reservation.

10. The State of New Mexico is without power or authority to levy and collect taxes on oil and gas production on the Jicarilla Apache Reservation by reason of the disclaimers contained in the Enabling Act for New Mexico, 36 Stat. 557, Section 2, and the Constitution of New Mexico, Article XXI, Section 2, and Section 10.

11. The Jicarilla Apache Severance Tax together with the state taxes on oil and gas production if valid, do not constitute such a burden upon commerce as to render either or both of those taxes unconstitutional. Said taxes are separate and do not constitute a single liability, therefore there is no basis for interpleader of the state and Tribal claims.

12. The Jicarilla Apache Oil and Gas Severance Tax, if passed on in whole or in part to the consumer of oil or gas, will result in a minimal increase in the consumer's price of oil or gas, if any. If the tax is absorbed by Plaintiffs, it will constitute a minimal burden on Plaintiffs. The ratio of the Jicarilla Apache Severance Tax to the interstate price of old oil or old gas and the ratio of the combined state and

Jicarilla tax on the interstate price of old oil or gas is irrelevant to the issues of this suit.

13. The 1968 Revised Constitution of the Jicarilla Apache Tribe was duly adopted and approved pursuant to law.

14. Even if there is no other similar tax levied on other federal lands over which the Tribe has no authority, Plaintiffs were not denied the equal protection of law.

(e) Defendant Tony Martinez, Defendant in No. 77-343P claims:

(1) This Court lacks jurisdiction by virtue of 28 U.S.C. §1341 to grant declaratory relief with respect to the validity of the various taxes imposed by the State of New Mexico as specified in the Complaint in No. 77-343P or with respect to the power and authority of Defendant Martinez to collect such cases.

(2) There is no justiciable controversy between the Plaintiffs and Defendant Martinez.

(3) The Complaint fails to state a claim for which relief may be granted against Defendant Martinez.

(4) The right is reserved to raise other claims and defenses at the time an Answer or other responsive pleading is due from Defendant Martinez.

3. UNCONTROVERTED FACTS: The following facts are established by admission in the pleadings or by stipulations of counsel at the pretrial conference:

(a) That the Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §476-477, residing on an Executive Order Indian reservation within the State of New Mexico;

(b) That the legislative powers of the Tribe reside in the Tribal Council;

(c) That Defendant Cecil Andrus is the Secretary of the Interior of the United States of America;

(c) That the amount in controversy exceeds $10,000.00 exclusive of interest and costs;

(e) That federal question jurisdiction is conferred on this Court by 28 U.S.C. §1331;

(f) That the Tribe is the beneficial owner of royalty interests created by oil and gas leases approved by the Secretary of the Interior pursuant to 25 U.S.C. §398 and 25 U.S.C. §396;

(g) That the question of the Revised Constitution was approved by Russell Train, Undersecretary of the Interior;

(h) That the Defendant Jicarilla Apache Tribal Council adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195;

(i) That copies of the Ordinance with instructions on its applicability and procedural requirements were served upon each of the Plaintiffs;

(j) That the Jicarilla Oil and Gas Severance Tax applies only to oil and gas produced on the Jicarilla Apache Reservation;

(k) That the Jicarilla Tribal Oil and Gas Severance Tax, Title 4, provides for an exemption from taxation for royalty oil, gas or condensate taken by the Tribe in kind and used by the Tribe;

(l) That the Tribe directed Plaintiffs that the Tax should be paid on gas, crude oil and condensate produced on the Reservation and sold or transported off the Reservation.

Stipulated Facts

(a) That Plaintiffs are individuals doing business or corporations duly authorized to do business within the State of New Mexico;

(b) That the lease numbers and property descriptions contained in Amended Exhibit "A" are correct;

(c) That the State of New Mexico imposes and collects the following taxes as measured by oil and gas production: Oil and Gas Emergency School Tax, the Oil and Gas Conservation Tax, the Oil and Gas Production Equipment Ad Valorem Tax, the Oil and Gas Severance Tax and the Natural Gas Processors Tax.

4. CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are:

(a) That the leases which are the basis of this case are between the proper parties and approved by the proper governmental authorities;

(b) Whether the Jicarilla Oil and Gas Severance Tax was approved by the Secretary of the Interior of the United States;

(c) Whether Plaintiffs or their customers will be irreparably harmed by having to pay such tax;

(d) Whether the tax imposed upon Plaintiffs is discriminatory;

(e) Whether the State of New Mexico received $636,391.00 from gas severance taxes on gas produced from the Jicarilla Apache Reservation in 1976, and whether a substantially higher figure will be received in 1977.

(f) Whether the State is required to impose the above taxes in order to provide governmental services to the Jicarilla Apache Reservation;

(g) Whether the Jicarilla Oil and Gas Severance Tax amounts to at least 12% of the interstate price of old gas;

(h) Whether the Jicarilla Oil and Gas Severance Tax Ordinance was approved by the authorized delegate of the Secretary of the Interior of the United States;

(i) Whether the Jicarilla Oil and Gas Severance Tax with the New Mexico Severance Tax, creates a combined tax burden of at least 29% of the interstate price of old gas;

(j) Whether any or all of the total tax may be passed on to the ultimate gas consumer;

(k) Whether the Jicarilla Oil and Gas Severance Tax is without congressional authorization.

5. CONTESTED ISSUES OF LAW: There are no special issues of law reserved other than those implicit in the foregoing issues of fact and contentions of the parties.

6. EXHIBITS: There are identified and offered the following:

(a) Plaintiffs Merrion and Bayless, et al., Plaintiffs in Cause No. 77-292 P CIV, Exhibits:

(1) List of all Plaintiffs' leases with Jicarillas together with property descriptions of each as stipulated to;

(2) Jicarilla Apache Tribal Ordinance of the Tribal Council 77-0-02, as amended by Ordiance No. 77-0-195;

(3) Instructions to all oil and gas lessees, operators and purchasing companies doing business on the Jicarilla Apache Reservation;

(4) Remittance forms filed by all Plaintiffs showing tax which would have been imposed for April, May and June, 1977;

(5) Revised Jicarilla Tribal Constitution, 1968;

(6) Gas and oil sales contracts;

(7) Possibly an economic impact study.

(b) Plaintiffs Amoco and Marathon, Plaintiffs in No. 77-343 P CIV. Exhibits:

(1) List of Amoco Leases within Jicarilla Apache Reservation showing production of oil and gas during 1976 and 1977;

(2) List of Marathon Leases within Jicarilla Apache Reservation showing production of oil and gas during 1976 and 1977;

(3) Copy of letter and acknowledgment of receipt of payment under protest of state taxes by Amoco for April, 1977;

(4) Copy of letter and acknowledgment of receipt of payment under protest of states taxes by Amoco for May, 1977;

(5) Copy of letter and acknowledgment of receipt of payment under the protest of state taxes by Marathon for April, 1977;

(6) Copy of letter and acknowledgment of receipt of payment under protest of state taxes by Marathon for May, 1977;

(7) Copy of Executive Orders pertaining to Jicarilla Apache Reservation;

(8) Operator's Remittance Report for Jicarilla tax for Amoco for April, 1977;

(9) Operator's Remittance Report for Jicarilla tax for Amoco for May, 1977;

(10) Operator's Remittance Report for Jicarilla tax for Marathon for April, 1977;

(11) Operator's Remittance Report for Jicarilla tax for Marathon for May, 1977.

(c) Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council's Exhibits:

(1) Dr. Alfred Parker's economic impact study;

(2) Exhibit regarding governmental services;

(3) Exhibit regarding legislative history of 25 U.S.C. §398(c);

(4) Peat, Marwick & Mitchell's accounting procedures.

(5) Exhibit regarding taxes paid to the State of New Mexico on oil and gas production from the Jicarilla Apache Reservation.

(6) Exhibit regarding authority of Undersecretary Russell E. Train to approve Jicarilla Apache Tribe's Constitution.

(7) Exhibit regarding authority of Loyd Nicholson to approve Jicarilla Apache Tribe's Severance Tax Ordinance.

(8) Exhibits admitted during the hearing on preliminary injunction.

(d) Defendant Cecil Andrus' Exhibits:

(e) Each party will mark his own exhibits and make a list thereof. Lists of exhibits will be furnished to all opposing counsel and the Court at least 10 days prior to trial. At that time all

exhibits will be made available for examination by opposing counsel. This rule does not apply to rebuttal exhibits which cannot be anticipated.

(f) Any counsel requiring authentication of an exhibit must so notify the counsel who proposes to offer the exhibit at least 5 days prior to trial.

7. DISCOVERY: Discovery is to be completed by August 22, 1977.

8. WITNESSES:

(a) In the absence of reasonable notice to opposing counsel to the contrary, Plaintiffs Merrion and Bayless, et al., will call or will have available at the trial:

(1) Thomas Dugan;

(2) Gregory Merrion or Robert L. Bayless;

(3) C. E. Lamb;

(4) George Deeter;

(5) R. A. Loosley;

(6) William S. Jameson;

(7) Royce McCary or another representative of Chase Oil;

Plaintiff Merrion and Bayless, et al., may call:

(1) Joseph A. Herrera;

(2) A witness from the New Mexico Oil and Gas Accounting Commission;

(3) A witness from Sherman H. Clark and Associates.

(b) In the absence of reasonable notice to opposing counsel to the contrary, Plaintiff Amoco and Marathon may call:

(1) Jack Blanscet;

(2) R. E. McCleskey.

(c) In the absence of reasonable notice to opposing counsel to the contrary, Defendants Jicarilla Apache Tribe and Jicarilla

Apache Tribal Council will call, or may have available at the trial:

(1) Dale Vigil;

(2) Richard Tecube;

(3) Dr. Alfred Parker;

(4) Nina Zintz;

(5) Espeedie Ruiz;

(6) Ronald Esquerra;

(7) Lloyd Nickelson;

(8) Ray Butler, Commissioner of Indian Affairs;

(9) Russell E. Train;

(10) Jim Follingstad

(d) In the absence of reasonable notice to opposing counsel to the contrary, Defendant Cecil Andrus, will call, or will have available at the trial:

Ray Butler, Acting Commissioner of Indian Affairs

Patrick Wehling, Realty Officer, Albuquerque Area

10. AMENDMENTS TO PLEADINGS: There are no amendments to the pleadings contemplated.

11. OTHER MATTERS: The following additional matters to aid in the disposition of the action were determined: Judge McCoy is assigned to determine all pretrial disputes.

12. MODIFICATIONS — INTERPRETATION: This pretrial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing by the Court. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order,

reference may be made to the record of this conference to the extent reported by stenographic notes, and to the pleadings.

13. TRIAL SETTING: The case was set for trial without a jury on August 29, 1977 at 9:30 A.M. The trial commencing on August 29 will include only the claims of Plaintiffs against the Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde and Cecil Andrus, Secretary of the Interior concerning the validity of the Jicarilla Oil and Gas Severance Tax. The claims of Plaintiffs Amoco and Marathon in No. 77-343 P for declaratory judgment against the Defendant Martinez and interpleader will be reserved for later determination. The Defendant Martinez has been notified of the trial commencing August 29, 1977 and may appear at such trial if he desires to assert any claims he might desire to make concerning the validity of the Jicarilla Oil and Gas Severance Tax.

14. MEMORANDUM: Estimated length of trial is 4 days. Possibility of settlement of this case is considered poor.

DATED: August , 1977.

.....
H. Vearle Payne
United States District Judge

The foregoing proposed pre-trial order (prior to execution by the Court), hereby approved this 15th day of August, 1977.

BRUCE D. BLACK

Bruce D. Black
CAMPBELL, BINGAMAN AND
BLACK, P.A.
Attorneys for Plaintiffs
Merrion and Bayless, et al.
Post Office Box 2208
Santa Fe, New Mexico 87501

JASON W. KELLAHIN
KELLAHIN & FOX
Attorneys for Plaintiffs
Merrion and Bayless, et al.
Post Office Box 1769
Santa Fe, New Mexico 87501

JOHN R. COONEY
John R. Cooney
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Attorneys for Plaintiffs
Amoco and Marathon
Post Office Box 2168
Albuquerque, New Mexico 87103

TERRY D. FARMER
Terry D. Farmer
NORDHAUS, MOSES & DUNN
Attorneys for Defendants
Jicarilla Apache Tribe
and Jicarilla Apache Tribal
Council
Suite #800, American Bank of
Commerce Building
200 Lomas N.W.
Albuquerque, New Mexico 87102

JAMES B. GRANT
James B. Grant
Assistant U. S. Attorney
Attorney for Defendant
Cecil Andrus
Post Office Box 607
Albuquerque, New Mexico 87103

TONEY ANAYA
Attorney General,
State of New Mexico

THOMAS L. DUNIGAN
Deputy Attorney General
for Defendant Tony Martinez

ANSWER OF CECIL ANDRUS
IN NO. 77-292-P,
U. S. DISTRICT COURT,
NEW MEXICO

PREVIOUS PAGE WAS BLANK

[Caption, Civil 77-292-P omitted in printing]

ANSWER

(Filed August 24, 1977)

Comes now the defendant, Cecil Andrus, Secretary of the Interior by his attorneys Victor R. Ortega, United States Attorney for the District of New Mexico, and James B. Grant, Assistant United States Attorney for said District and in answer to the Complaint herein states and alleges as follows:

FIRST CAUSE OF ACTION

1. Paragraphs 1 through 17 contain information about which defendant has no knowledge or information to form a belief and the same are therefore denied.

2. Defendant admits the allegations contained in paragraphs 18, 19, 20 and 21.

3. Paragraph 22 contains conclusions of law which require no answer but which are nevertheless denied and further states that this Court has no jurisdiction over the Jicarilla Apache Tribe or the Jicarilla Apache Tribal Council because of sovereign immunity of the Tribe and further lacks jurisdiction over the Secretary of the Interior in actions of this nature.

4. Defendant admits the allegations contained in paragraph 23.

5. Defendant admits that the leases identified in Exhibit A cover oil and gas development on Jicarilla Tribal lands but denies that paragraph 22 makes mention or reference to any Tribal oil or gas lease. Defendant further admits that Exhibit B is the form of oil and gas lease typically used for Indian Tribal land oil and gas development.

6. Defendant denies the allegations contained in paragraph 25.

7. Defendant admits the allegations contained in paragraph 26 except for the characterization "without hearing or due consideration". Defendant further states that a hearing was not required by law or regulation and that due consideration was given to pertinent laws and regulations.

8. In answer to paragraph 27 defendant admits that Ordinance No. 77-0-02 was adopted on July 9, 1976 but denies that such action was without lawful authority and further admits that Exhibit C is a copy of said Ordinance.

9. Defendant admits the allegations of paragraph 28 except for the characterization "without hearing or due consideration".

10. Paragraphs 30 and 31 contain conclusions of law which require no answer but which are nevertheless denied.

11. Defendant denies the allegations contained in paragraph 32.

SECOND CAUSE OF ACTION

12. In answer to paragraph 1 of plaintiffs' Second Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

13. Defendant denies the remaining allegations contained in the Second Cause of Action.

THIRD CAUSE OF ACTION

14. In answer to paragraph 1 of plaintiffs' Third Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

15. Defendant denies the remaining allegations contained in the Third Cause of Action.

FOURTH CAUSE OF ACTION

16. In answer to paragraph 1 of plaintiffs' Fourth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

17. Defendant denies the remaining allegations contained in the Fourth Cause of Action.

FIFTH CAUSE OF ACTION

18. In answer to paragraph 1 of plaintiffs' Fifth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

19. Defendant denies the allegations contained in paragraph 2.

20. In answer to paragraph 3 defendant admits the first sentence but is without sufficient information or knowledge to form a belief as to the remainder of the paragraph and it is therefore denied.

21. Defendant is without sufficient information, knowledge or belief to form an answer to paragraph 4 and the same is therefore denied.

22. Paragraphs 5 and 6 contain conclusions of law which require no answer but which are nevertheless denied.

23. Defendant denies the allegations contained in paragraph 7.

SIXTH CAUSE OF ACTION

24. In answer to paragraph 1 of plaintiffs' Sixth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

25. Defendant admits the first two sentences of paragraph 2 but states that the power of Indian tribes to tax non-Indian's use of Indian reservation property does not derive from Congressional authorization.

26. Paragraph 3 contains legal conclusions which require no answer but which are nevertheless denied.

SEVENTH CAUSE OF ACTION

27. In answer to paragraph 1 of plaintiffs' Seventh Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

28. Defendant admits the allegations contained in paragraphs 2, 3 and 4.

29. Paragraph 5 contains legal conclusions which require no answer but which are nevertheless denied.

EIGHTH CAUSE OF ACTION

30. In answer to paragraph 1 of plaintiffs' Eighth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

31. Paragraph 2 is a legal conclusion in answer to which defendant states that the Declaratory Judgment Act does not authorize a determination of the Constitutional rights of the Jicarilla Apache Tribe.

32. In answer to paragraph 3 defendant admits that a controversy exists but denies the controversy is justiciable by reason of the Tribe's sovereign immunity.

33. Defendant denies all allegations contained in plaintiffs' Complaint not specifically admitted herein.

WHEREFORE defendant states affirmatively that plaintiffs have failed to state a claim upon which relief may be granted; that the Court lacks jurisdiction over the defendants herein and that the Complaint should be dismissed, or, in the alternative, that this defendant should be granted summary judgment and that plaintiffs take naught by their action and for such other relief as the Court may deem appropriate.

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
Assistant U.S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 24th day of August, 1977.

JAMES B. GRANT
Assistant U.S. Attorney

ANSWER OF CECIL ANDRUS
IN NO. 77-343-P,
U. S. DISTRICT COURT,
NEW MEXICO

PREVIOUS PAGE WAS BLANK

[Caption, Civil 77-343-P Omitted in Printing]

ANSWER

(Filed August 24, 1977)

Comes now the defendant, Cecil Andrus, Secretary of the Interior by his attorneys Victor R. Ortega, United States Attorney for the District of New Mexico, and James B. Grant, Assistant United States Attorney for said District in answer to the Complaint herein states and alleges as follows:

COUNT I

1. Defendant has insufficient knowledge or information to form a belief as to paragraphs 1 and 2 and the same are therefore denied.

2. Defendant admits the allegations contained in paragraph 3.

3. Defendant admits the allegations contained in paragraph 4 except it has insufficient knowledge or information to form a belief as to the responsibility for the enforcement and collection of the severance tax and that allegation is therefore denied.

5. Defendant admits the allegations of paragraph 5.

6. Defendant has insufficient information or knowledge to form a belief as to paragraph 6 and the same is therefore denied.

7. Defendant admits the allegations of paragraph 7.

8. Paragraph 8 contains conclusions of law which require no answer but which are nevertheless denied.

9. Defendant admits the allegations of paragraph 9 except as to the allegation concerning 25 U.S.C. 396 which is denied.

10. Defendant admits the allegations of paragraph 10.

11. In answer to paragraph 11 defendant admits the adoption of a "Revised Constitution" by the Tribe but denies the stated date and the characterization "without lawful authority or procedure".

12. Defendant admits the allegations of paragraph 12 except for the words "without hearing or due consideration" and states affirmatively that a hearing is not a requirement and that due consideration was given to pertinent statutes and regulations.

13. Defendant admits the allegations of paragraph 13 but denies the ordinance was adopted "without lawful authority".

14. Defendant admits the allegations of paragraph 14 but denies the characterization "without hearing or due consideration".

15. Defendant admits the allegations of paragraph 15.

16. Defendant denies the allegations of paragraph 16.

17. Paragraphs 17 and 18 contain conclusions of law which require no answer but which are nevertheless denied.

COUNT II

18. In answer to paragraph 1 defendant adopts his answers to Count I herein.

19. In answer to paragraph 2 defendant admits the tax applies only to oil and gas "produced on the Jicarilla Apache Reservation" and denies the balance of the allegations as they are conclusions of law.

20. Defendant admits the Secretary of the Interior approved the tax ordinance but denies the balance of the paragraph.

21. Defendant denies the allegations contained in paragraph 4.

COUNT III

22. In answer to paragraph 1 defendant adopts his answers to Count I herein.

23. Defendant admits the allegations contained in paragraph 2 and denies the allegations in paragraphs 3 and 4.

COUNT IV

24. In answer to paragraph 1 defendant adopts his answers to Count I herein.

25. The balance of Count IV contains conclusions of law which require no answer but which are nevertheless denied.

COUNT V

26. In answer to paragraph 1 defendant adopts his answers to Count I herein.

27. The balance of Count V contains conclusions of law which require no answer and statistics of which the defendant lacks sufficient information or knowledge to form a belief and paragraphs 2 through 7 are denied.

COUNT VI

28. In answer to paragraph 1 defendant adopts his answers to Count I herein.

29. Defendant admits the first sentence of paragraph 2 and denies the balance of that paragraph.

30. Defendant denies the allegations contained in paragraph 3.

COUNT VII

31. In answer to paragraph 1 defendant adopts his answers to Count I herein.

32. Defendant admits the allegations contained in paragraphs 2 and 3.

33. Paragraphs 4 and 5 contain conclusions of law which require no answer but which are nevertheless denied.

COUNT VIII

34. In answer to paragraph 1 defendant adopts his answers to Count I herein.

35. Defendant admits the allegations of paragraph 2.

36. Defendant admits the allegations of paragraph 3 except that the date of adoption of the Tribal Constitution was December 23, 1968.

37. Paragraphs 4 and 5 contain conclusions of law which require no answer but which are nevertheless denied.

38. Defendant denies the allegations contained in paragraphs 6 and 7.

COUNT IX

39. In answer to paragraph 1 defendant adopts his answer to Count I herein.

40. The balance of Count IX contains conclusions of law which require no answer but which are nevertheless denied.

COUNT X

41. In answer to paragraph 1 defendant adopts his answer to Count I herein.

42. Paragraph 2 contains conclusions of law which require no answer but which are nevertheless denied.

43. Defendant denies the allegations contained in paragraph 3.

COUNT XI

44. In answer to paragraph 1 defendant adopts his answer to Count I herein.

45. The balance of Count XI are conclusions of law which require no answer but which are nevertheless denied.

COUNT XII

46. All answers previously pled to Counts I through XI are adopted by reference to paragraph 1.

47. Defendant admits the first sentence of paragraph 2 and lacks sufficient information or knowledge to form a belief as to the balance of the allegations of paragraph 2 and the same are therefore denied.

48. Paragraphs 3, 5 and 8 contain conclusions of law which require no answer but which are nevertheless denied.

49. Defendant denies the allegations contained in paragraphs 4, 6, 9, 10 and 11.

50. Defendant lacks sufficient information or knowledge to form a belief as to the allegations contained in paragraph 7 and the same is therefore denied.

51. Defendant denies all allegations contained in plaintiffs' Complaint not specifically admitted herein.

WHEREFORE defendant states affirmatively that plaintiffs have failed to state a claim upon which relief may be granted; that the Court lacks jurisdiction over the defendants herein and that the Complaint should be dismissed, or, in the alternative, that this defendant should be granted summary judgment and that plaintiffs take naught by their action and for such other relief as the Court may deem appropriate.

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
James B. Grant
Assistant U. S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 24th day of August, 1977.

J. B. GRANT
Assistant U. S. Attorney

MOTION FOR LEAVE TO AMEND ANSWER AND FOR REHEARING ON CERTAIN ISSUES AND AMENDMENT OF ANSWER OF JICARILLA APACHE TRIBE, ET AL., CASE NO. 77-343-P.

PREVIOUS PAGE WAS BLANK

[Consolidated Caption Omitted in Printing]

MOTION FOR LEAVE TO AMEND ANSWER AND FOR A REHEARING ON CERTAIN ISSUES

Filed October 21, 1977

Come now the Defendants, Jicarilla Apache Tribe and Jicarilla Apache Tribal Council by their attorneys, Nordhaus, Moses & Dunn, and ask the Court for leave to amend by interlineation Defendants' Answer filed herein and for a rehearing on the claims of Plaintiffs that Congress gave the various states the exclusive rights, power and authority to levy taxes on the output of oil and gas wells on the Jicarilla Apache Reservation.

As grounds for Defendants' Motion for Leave to Amend and for Rehearing Defendants state:

1. It has come to the attention of Defendants that *all of the leases which are the subject of the within action* were issued under the authority of the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. 396, rather than under the authority of the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. 398, as appears from the certification of Harold TeCube, Realty Officer, Jicarilla Agency, Bureau of Indian Affairs, attached hereto. Plaintiff's Complaint alleged that the leases in suit were sold by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. 398 and 25 U.S.C. 396 (First Cause of Action, Paragraph 23). Plaintiffs purportedly attached a copy of the lease form as Exhibit "B", but the copy of the lease form was incomplete in that it did not include the "Forest and Land Protection Stipulations", which contained among other provisions the following:

> "The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Apache Indian Reservation, the lessees hereby agrees: . . . ."

By reason of the failure of Plaintiffs, advertent or inadvertent, to attach the complete lease as Exhibit "B" to the Complaint, and further because the Court neither required the Plaintiffs,

despite Defendants' objections, to introduce the leases in evidence nor to prove the authority for their issuance, (Trial Transcript, pp. 61-63), *the Court accepted Plaintiffs allegations and statements that all of the leases were issued under authority of 25 U.S.C. 398* (the Act of March 3, 1927) whereas actually, all of the leases subject to the litigation were issued pursuant to the Act of May 11, 1938, 25 U.S.C. 396a et. seq. The 1938 Act was a comprehensive leasing statute for Indians lands, which did not authorize taxation by states of production of oil and gas on lands leased pursuant thereto. Plaintiffs' Memorandum Brief, filed concurrently herewith, sets forth in detail the reasoning to support this conclusion.

2. The Court in its Findings of Fact entered July 6, 1977, in granting a Preliminary Injunction, found as follows:

> 6. That in enacting 25 U.S.C. 398(c) Congress intended to allow the states and local governments the right to tax oil and gas production from Executive Order Indian reservations.

The Court entered conclusions of law as follows:

> 3. By enacting 25 U.S.C. 398(c) Congress granted the states and local governments the authority to impose a severance tax upon oil and gas produced from Executive Order Indian reservations.
>
> 4. That the Jicarilla Apache Tribe is not a "state or local authority" as contemplated under 25 U.S.C. 398(c).

The authority of the states to tax production contained in the Acts of May 29, 1924 and March 3, 1927, *supra, was not continued in the comprehensive leasing Act of May 11, 1938. There being no authority to tax production by lessees whose leases were issued under the 1938 Act, there can be no limitation or preemption of the Tribe's authority to tax,* as set forth in Defendant's Memorandum Brief filed concurrently herewith.

It appearing that all of the leases at issue were authorized by the Act of May 11, 1938, 25 U.S.C. 396, rather than the Act of

March 3, 1927, 25 U.S.C. 398, the record should be corrected to establish the legal authority for issuance of the leases under which the Plaintiffs operate.

Respectfully submitted,
NORDHAUS, MOSES & DUNN

By ROBERT J. NORDHAUS

Robert J. Nordhaus
800 American Bank of Commerce
200 Lomas Boulevard NW
Albuquerque, New Mexico
87102
Telephone: 505/843-9440
Attorney for Defendants

This is to certify that a copy of the foregoing Motion was mailed to all opposing counsel on this 21st day of October, 1977.

ROBERT J. NORDHAUS
(Robert J. Nordhaus)

CERTIFICATION

I, Harold TeCube, Realty Officer, Jicarilla Agency, BIA., Dulce, New Mexico hereby certify that, I am Custodian of the BIA records pertaining to Oil and Gas leases on Jicarilla Apache Tribal lands and that the official BIA records of oil and gas lease sales in said Agency office indicated that all oil and gas leases on Jicarilla Apache Tribal lands were issued and are presently being operated pursuant to the Act of May 11, 1938. The notices of sale advertising said leases apecifically referred to the Act of May 11, 1938, as authority for issuance of said lease.

DATED this 20th day of October, 1977.

s/ HAROLD TECUBE

Harold TeCube
Realty Officer
Jicarilla Agency
Dulce, New Mexico

(Notarization Omitted in Privy)

[Caption, Civil 77-343-P omitted in printing]

AMENDMENT OF ANSWER OF JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND GWENDOLYN VELARDE*

(Filed October 21, 1977)

Comes now the Defendants, Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, by their attorneys, Nordhaus, Moses & Dunn, and for their answer to Intervenor Plaintiffs' Complaint state:

Defendants amend Paragraph 8 of Count I of their Answer to read as follows:

> "8. In response to Paragraph 9, these Defendants deny that the leases were granted by the Secretary of Interior with the consent of the Tribe pursuant to 25 U.S.C. 398, and admit that leases were granted by the Secretary of Interior with the consent of this Tribe pursuant to 25 U.S.C. 396.

Defendants amend Paragraph 2 of Count V of their Answer to read as follows:

> "2. Defendants deny each and every allegation contained in Paragraphs 2, 5 and 7 of Plaintiffs' Count V. Defendants state affirmativel, that 25 U.S.C. 398 and 398(c) are not applicable to the leases described in Plaintiffs' Complaint which were issued under 25 U.S.C 396(b) and that the State of New Mexico has no authority to tax production of lessees on Tribal lands where leases were issued under authority of 25 U.S.C. 396.

Defendants amend Paragraph 4 of Count VIII of their Answer to read as follows:

> "4. Defendants deny each and every allegation of Paragraph 5. Defendants state affirmatively that Sections

---

* A similar amendment of answer was filed in Case No. Civil 77-292-P.

25 U.S.C. 398 and 398(c) are not applicable to the production on the leases described in the Complaint. Therefore, the states do not have the right to levy taxes on production on the leases described in Plaintiffs' Complaint.

Defendants amend Count XI, Paragraph 2 of their Answer to read as follows:

"2. In response to Paragraph 2, 3, 4, and 5, Defendants state that the allegations therein constitute legal conclusions for which no response is necessary. In the alternative, Defendants deny each and every allegation of Paragraph 2, 3, 4 and 5. Defendants state affirmatively that the oil and gas severance tax of the State of New Mexico, if valid, does not preempt the levy of severance taxes by the Tribe. Defendants further state that if such taxes are mutually exclusive, the taxes levied by the State of New Mexico are invalid because the State of New Mexico has no right or power to tax production on Indian lands leased under the Act of May 11, 1938, 25 U.S.C. 396 or under the New Mexico Enabling Act, 36 Stat. 557, 558-559 (1910) or the New Mexico Constitution.

Respectfully submitted,

NORDHAUS, MOSES & DUNN

By ROBERT J. NORDHAUS

Robert J. Nordhaus
800 American Bank
of Commerce Complex
200 Lomas Boulevard N.W.
Albuquerque, New Mexico 87102
Telephone: 505/843-9440
Attorney for Defendants

This is to certify that a copy of the foregoing Amendment of Answer was mailed to all opposing counsel on this 21st day of October, 1977.

ROBERT J. NORDHAUS

ORDER DENYING MOTION TO AMEND ANSWER AND REHEARING ON CERTAIN ISSUES

[Consolidated Caption Omitted in Printing]

ORDER

(Filed December 21, 1977)

THIS MATTER comes on for consideration upon the motion of the defendants, Jicarilla Apache Tribe and Jicarilla Apache Tribal Council, for leave to amend their answer and for a rehearing on certain issues and the Court having reviewed the file, exhibits, letters submitted by the parties and memoranda therein and being fully advised in the premises concludes that the motion is not well taken and should not be granted;

NOW, THEREFORE,

IT IS BY THE COURT ORDERED that the defendants' motion for leave to amend and for a rehearing on certain issues be, and it is hereby denied.

H. VEARLE PAYNE
United States District Judge

COURTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW

PREVIOUS PAGE WAS BLANK

[Consolidated Caption Omitted in Printing]

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed December 29, 1977)

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, are residents of the State of New Mexico.

2. Jerome T. McHugh is a resident of the State of New Mexico.

3. Chase Oil Company is a New Mexico Corporation with its principal place of business in New Mexico.

4. Dugan Production Corporation is a New Mexico Corporation with its principal place of business in New Mexico.

5. Consolidated Oil and Gas, Inc., is a Colorado corporation with its principal place of business in Colorado.

6. Southland Royalty Company, formerly Aztec Oil and Gas, is a Delaware Corporation with its principal place of business in the State of Texas.

7. Tesoro Petroleum Corporation is a Delaware Corporation with its principal place of business in the State of Texas.

8. Amerada Hess is a Delaware Corporation with its principal place of business in the State of New York.

9. Supron Energy Corporation, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. Energy Reserves Group, Inc., is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. Huber Corporation is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. Continental Oil Company is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. Atlantic Richfield Company is a Pennsylvania Corporation located within the State of California.

14. Phillips Petroleum Company is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. Tenneco Oil Company is a Delaware Corporation with its principal place of business located within the State of Texas.

16. Getty Oil Company is a Delaware Corporation with its principal place of business located in California.

17. Gulf Oil Corporation is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Mobil Oil Corporation is a Delaware Corporation with its principal place of business in the State of New York.

19. Oxy Petroleum, Inc., is a California Corporation, with its principal place of business in the State of California.

20. Amoco is a Delaware corporation with its principal place of business in Illinois.

21. Marathon is an Ohio corporation with its principal place of business in Ohio.

22. The Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §§476-477, residing on an Executive Order Indian Reservation within the boundaries of the State of New Mexico. The Jicarilla Apache Tribal Council exercises the legislative powers of the Jicarilla Apache Tribe. Gwendolyn Velarde is the Treasurer of the Jicarilla Apache Tribe and is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax. Cecil Andrus is Secretary of the Interior.

23. The plaintiffs hold leases, granted by the Secretary of the Interior with the consent of the Tribe, for the recovery of oil and gas on the Jicarilla Apache Indian Reservation. Plaintiffs are at present producing oil and gas products on the reservation and paying royalties to the Tribe. Approximately 80% of the products are shipped interstate for sale outside the State of New Mexico.

24. The State of New Mexico imposes and collects from the plaintiffs the following taxes measured by the production on the Jicarilla Apache Reservation:

Oil and gas emergency school tax;

Oil and gas conservation tax;

Oil and gas production equipment ad valorem tax; and

Oil and gas severance tax.

25. The Jicarilla Apache Tribe on November 22, 1968, adopted a revised constitution which included a provision authorizing the Tribal Council to enact ordinances providing for the levy and collection of taxes and fees on nonmembers of the Tribe doing business on the reservation. The revised constitution, as amended, was approved by the acting Undersecretary of the Interior on or about February 13, 1969.

26. On or about July 9, 1976, the Jicarilla Apache Tribal Council adopted the Jicarilla Oil and Gas Severance Tax in No. 77-0-02 and thereafter such ordinance was amended by Tribal Council Ordinance No. 77-0-195 and resolution 77-327.

27. That in enacting 25 U.S.C. §398(c) Congress intended to allow the states and local authorities the exclusive right to tax oil and gas production from executive order Indian reservations.

28. That in enacting 25 U.S.C. §398(c) Congress did not intend to include Indian tribes within the meaning of "state or local authority."

29. The Jicarilla Oil and Gas Severance Tax by its terms and the instructions for its implementation applies only to oil and gas produced on the Jicarilla Apache Reservation and not to similarly situated oil and gas produced in the same geological region of northwest New Mexico.

30. The Jicarilla Oil and Gas Severance Tax expressly provides for an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the tribe."

31. The Jicarilla Apache Tribal Oil and Gas Severance Tax as well as the written instructions directed to plaintiffs with regard to the payment of the tax, expressly provides that the tax need only be paid on gas, crude oil or condensate produced on the Jicarilla Apache Reservation "and sold or transported off the Reservation."

32. The Jicarilla Oil and Gas Severance Tax would, if valid, amount to over two million dollars annually.

33. That the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla Gas Severance Tax, if valid, onto their customers.

34. That if the plaintiffs are required to absorb the Jicarilla Oil Severance Tax such tax will substantially limit the ability of some of the plaintiffs to profitably operate some of the existing oil wells on the Jicarilla Apache Reservation.

35. If the wells operated by plaintiffs cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe.

36. That if the Jicarilla Apache Oil and Gas Severance Tax were valid the combined tax burden amounts to more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

37. That unless the Jicarilla Apache Tribal Severance Tax contained in Tribal Council Ordinance No. 77-0-02, as amended

by Tribal Ordinance No. 77-0-195 and resolution 77-327, is declared invalid and the defendants restrained from taking action they will move to enforce such Ordinances and resolutions and collect the Jicarilla Apache Tribal Oil and Gas Severance Tax.

38. The Jicarilla Apache Tribe Severance Tax become effective April 1, 1977. Under the terms of the ordinance, plaintiffs would be subject to the severance tax by virtue of their production of natural gas and condensate on the Jicarilla Apache Reservation. Enforcement of the tax has been stayed pending a resolution of the legality of the tax.

39. That plaintiffs sell the gas and oil produced from the Jicarilla Apache Reservation in both interstate and intrastate commerce.

40. Prior to their incorporation under the Indian Reorganization Act in 1937 the Jicarilla Apache Tribe had never attempted to exercise a power of taxation over non-Indians.

41. That in adopting the Indian Reorganization Act 25 U.S.C. §464 *et seq.* Congress intended Indian tribes accepting a charter thereunder to have only those powers specifically enumerated in the Act together with such powers as were "vested in any Indian tribe or tribal council by existing law." The power to tax non-Indians is not one of the enumerated powers given to Indian Tribes incorporating under 25 U.S.C. §464 and was not vested in the Jicarilla Apache Tribe by existing law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action.

2. That venue is proper in the United States District Court for the District of New Mexico.

3. That by enacting 25 U.S.C. §398(c) Congress granted the state and local authorities the exclusive right to impose a severance tax upon oil and gas produced from executive order Indian reservations.

4. That the Jicarilla Apache Tribe is not a "state or local authority" within the meaning of 25 U.S.C. §398(c).

5. The Jicarilla Apache Tribe Oil and Gas Severance Tax constitutes an unlawful multiple burden on interstate commerce.

6. The Jicarilla Apache Tribe Oil and Gas Severance Tax is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation and therefore discriminates against interstate commerce.

7. Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation.

8. That, as of the effective date of 25 U.S.C. §464, et seq., the power to tax non-Indians was not vested in the Jicarilla Apache Tribe or its Tribal Council, and not being one of the powers enumerated in the Act, the Secretary of the Interior's approval of the Tribal Constitution cannot operate to vest such power in the Tribe.

9. An actual justiciable controversy exists between the plaintiffs and defendants under the meaning of the Declaratory Judgment Act, 25 U.S.C. 2201 *et seq.* and pursuant to that act this Court declares the Jicarilla Oil and Gas Severance Tax to be illegal, unconstitutional, invalid and void and in conjunction with this Declaratory Judgment issues a permanent injunction restraining defendants from taking any action to collect the Jicarilla Apache Oil and Gas Severance Tax.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

H. VEARLE PAYNE
United States District Judge

JUDGMENT,
U.S. DISTRICT COURT
NEW MEXICO

PREVIOUS PAGE WAS BLANK

[Consolidated Caption omitted in printing]

JUDGMENT

(Filed December 29, 1977)

THIS MATTER having been heard by the Court and the Court having studied the briefs submitted by the parties, heard the testimony, evidence and arguments of counsel and having entered its Findings of Fact and Conclusions of Law and being otherwise fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid and void, it is therefore,

ORDERED that a Permanent Injunction is herewith issued and that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with defendants be, and they hereby are restrained and enjoined from taking any action to enforce or collect the Jicarilla Apache Oil and Gas Severance Tax.

IT IS FURTHER ORDERED that the plaintiffs and intervenors recover their costs to be taxed by the Clerk of the Court.

H. VEARLE PAYNE

United States District Judge

ORDER OF DISMISSAL

PREVIOUS PAGE WAS BLANK

[Consolidated Caption Omitted in Printing]

ORDER OF DISMISSAL

(Filed May 22, 1978)

This matter having come before the Court on the motion of Plaintiffs in No. 77-343-P for an Order of Dismissal as to their claims against the Defendant Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, and the Court being fully advised in the premises finds that such motion should be granted. It is therefore

ORDERED that the claims of the Plaintiffs in No. 77-343-P against the Defendant Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, shall be and the same hereby are dismissed, provided that if the Judgment entered herein on December 29, 1977, concerning the claims of all Plaintiffs against the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Cecil Andrus, Secretary of the Interior, and Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, should hereafter be reversed or otherwise set aside, and if the issues presented by such claims should be remanded to this Court, then the claims of the Plaintiffs in No. 77-343-P against the Defendant Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, shall be reinstated and may be determined at such time, subject to the right of the Defendant Martinez to assert and have decided whatever defenses he might have to such claims, including any defenses challenging the jurisdiction of this Court to determine such claims.

H. VEARLE PAYNE
United States District Judge

APPROVED:

THOMAS L. DUNIGAN
Thomas L. Dunigan
Deputy Attorney General

JOHN R. COONEY
John R. Cooney
Modrall, Sperling, Roehl, Harris & Sisk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (AS AMENDED), DECIDED FEBRUARY 22, 1980

PREVIOUS PAGE WAS BLANK

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 78-1154

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, AND GULF OIL CORPORATION,

Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendants-Appellants.

MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.

Intervenors-Appellees.

No. 78-1251

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,

Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. Nos. 77-292P & 77-343P)

Robert J. Nordhaus and Terry D. Farmer, of Nordhaus, Moses & Dunn, Albuquerque, New Mexico, for Defendants-Appellants, Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde.

Maryann Walsh, Attorney (James W. Moorman, Assistant Attorney General, Sanford Sagalkin, Deputy Assistant Attorney General, Neil T. Proto, Attorney, Peter R. Steenland, Jr., Attorney, Department of Justice, with her on the briefs), Washington, D. C., for Defendant-Appellant Cecil Andrus, Secretary of the Interior.

Bruce D. Black of Campbell, Bingaman & Black, P.A., Santa Fe, New Mexico, and Jason W. Kellahin of Kellahin & Kellahin, Santa Fe, New Mexico, for Plaintiffs-Appellees Merrion and Bayless, et al.

John R. Cooney of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico (R. H. Landt of Amoco Production Company, Denver, Colorado, Richard L. Marler of Marathon Oil Company, Findlay, Ohio, Mark B. Thompson, III, of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico, with him on the briefs), for Plaintiffs-Appellees Amoco Production Company and Marathon Oil Company.

George P. Vlassis (Lawrence A. Ruzow, Katherine Ott, Gary Verburg, of counsel) of Vlassis, Ruzow & Crowder, Phoenix, Arizona, filed an amicus curiae brief for the Navajo Nation.

Reid Peyton Chambers of Sonosky, Chambers & Sachse, Washington, D. C. and Marvin J. Sonosky of Washington, D. C., of counsel, filed an amicus curiae brief for the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes.

Charles A. Hobbs of Washington, D. C., filed an amicus curiae brief for National Congress of Americans Indians, Inc., the Arapaho Tribe of the Wind River Reservation, and the Three Affiliated Tribes of The Fort Berthold Reservation.

Toney Anaya, Attorney General, and Jan Unna, Special Assistant Attorney General, the State of New Mexico, Santa Fe, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Robert B. Hansen, Attorney General, Richard L. Dewsnup, Dallin W. Jensen, Frank V. Nelson, Assistants Attorney General, of the State of Utah, Salt Lake City, Utah, filed an amicus curiae brief for the State of Utah.

John J. Rooney, Acting Attorney General, the State of Wyoming, Cheyenne, Wyoming, Alan I. Olson, Attorney General, the State of North Dakota, Bismarck, North Dakota, and Mike Greeley, Attorney General, the State of Montana, Helena, Montana, filed an amicus curiae brief for the States of Wyoming, North Dakota and Montana.

Before SETH, Chief Judge, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY and LOGAN, Circuit Judges (en banc).

LOGAN, Circuit Judge.

This appeal arises out of two suits, consolidated for trial, brought by appellees against the Jicarilla Apache Tribe and its Tribal Council (the Tribe). Appellees (lessees), who are non-Indians, produce oil and gas from within the Tribe's reservation pursuant to leases granted them under the auspices of the Secretary of the Interior. After the Tribe enacted an oil and gas severance tax to be measured by production from oil and gas wells within the reservation, lessees sued the Tribe and Secretary of the Interior, Cecil Andrus,[1] seeking a declaratory judgment and

---

[1] In one of the essentially identical cases Gwendolyn Velarde, Treasurer of the Tribe, and Tony Martinez, Executive Director of

injunction that would prohibit enforcement of this tax. After a nonjury trial, the judge permanently enjoined enforcement declaring the tax "illegal, unconstitutional, invalid and void."

The issues on appeal are whether,

(1) the district court had jurisdiction over the claims against the Tribe and the Secretary of the Interior,

(2) the Tribe has the inherent power to levy the severance tax,

(3) the tax violates the Commerce Clause of the United States Constitution, and

(4) Congress preempted tribal taxation.

The Jicarilla Apache Tribe is an Indian Tribe occupying an executive order reservation in northwestern New Mexico. The Tribal Council is the legislative arm of the Tribe's government. In 1968 the Tribe adopted a revised constitution pursuant to the Indian Reorganization Act of 1934, §§16, 17, 25 U.S.C. §§ 476, 477. Article XI of that constitution provides, in pertinent part,

> Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior and the restrictions established by this revised constitution.
>
> . . . .
>
> (e) Taxes and Fees. The tribal council may levy and collect taxes on fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the

---

the New Mexico Oil and Gas Accounting Commission, were named as individual defendants. Prior to trial Martinez was dismissed from the suit without prejudice.

Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

The revised constitution was approved by the Under Secretary of the Interior in 1969.

In 1976 the Tribal Council adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." The operators are required to pay the tax, which is due at the time of severance and is payable monthly. The tax rate is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation." "Royalty gas, oil or condensate, taken by the Tribe in kind, and used by the Tribe" is exempt from taxation. The Secretary, through the Acting Area Director of the Bureau of Indian Affairs, formally approved the tribal ordinance in December of 1976.

Among the trial court's findings are the following: Approximately 80% of the oil and gas produced by lessees is shipped interstate for sale outside the state of New Mexico; the tax would generate over two million dollars annually; the lessees would be able to pass the majority of the tax burden on to their customers; if the lessees are required to absorb the tax, the ability of some of the lessees to operate profitably some of the existing oil wells on the reservation would be substantially limited; those lessees not able to profitably operate wells "would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe"; and the tax burden on the price of oil and gas would be more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

Based upon these findings the trial court held that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empower the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple

burden on interstate commerce in violation of the Commerce Clause.

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. §702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe cannot be sued absent consent. *See also* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977). Here the Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to

---

[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court. The ordinance was approved by the representative of the Secretary of the Interior. The question is whether this constitutes effective consent.

We see no reason in principle or in law to conclude a Tribe that has taken advantage of Congress' encouragement to organize for purposes of providing for its common welfare under 25 U.S.C. § 476, has adopted a constitution, and has formally attempted to waive its sovereign immunity in this ordinance, may not do so. We believe the grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity to suit when the ordinance, as here, has been specifically approved by the Secretary of Interior. We therefore hold the trial court had jurisdiction over the Tribe.[3]

II

In treating the merits of this appeal, we first consider the basic question whether the Tribe may impose a tax upon nonmembers of the Tribe doing business within the Tribe's territorial jurisdiction. The tax instituted by the Tribe here is an excise or privilege tax imposed on the occupation of severing oil and gas from tribal land, measured by quantity produced. *See* Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934). *See also* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). Since no treaty or act of Congress specifically authorizes the exercise of such a taxing power, we must decide whether that power is among those

[3] Even were we to conclude the ordinance did not constitute effective consent, it is clear that the court properly reached the merits in one of the cases consolidated for trial. Plaintiffs Amoco Production Company and Marathon Oil Company, in addition to naming the Tribe and Tribal Council as defendants, sued individually the tribal official charged with the enforcement and collection of the tax. The Tribe's immunity from suit does not extend to tribal officials; therefore the trial court properly heard this case. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

"vested in any Indian Tribe or tribal council by existing law," Indian Reorganization Act of 1934, §16, 25 U.S.C. §476, *i.e.*, whether the Tribe has the inherent power to levy this tax. In making this determination, we recognize the fundamental principle that the power of taxation, which is essential to the very existence of self-government, is an attribute of sovereignty and extends generally to all that is within that government's territorial jurisdiction. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-29 (1819).

It has long been recognized that Indian tribes, although once self-governing political nations, no longer possess the full attributes of sovereignty. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, the tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). They retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the exercise of its plenary authority over them, or not inconsistent with the superior interests of the United States as a sovereign nation. Oliphant, 435 U.S. at 208-09; United States v. Wheeler, 435 U.S. 313, 323 (1978).

While the Supreme Court has not passed directly upon the question before this Court, it has determined that certain powers were not retained by the tribes upon their incorporation because of the superior interests of the United States. It has long been established, for example, that the tribes, though rightful occupants of the soil, may not convey it at their will, superior title having vested in the United States. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Because of the United States' interest in protecting its external political boundaries, the tribes as sovereign entities may not deal with foreign nations. The Cherokee Nation v. Georgia, 30 U.S. (5

Pet.) 1, 17-18 (1831). Most recently, the Supreme Court determined that the tribes also gave up the power to exercise criminal jurisdiction over non-Indians, on the ground the power of the tribes to restrict the personal liberty of United States citizens' conflicts with the federal government's overriding interest in protecting its citizens "from unwarranted intrusions on their personal liberty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

We do not find that tribal tax legislation in the context of this case necessarily and in every instance implicates a sovereign federal interest in the same way criminal adjudication, sale of tribal land, and governmental dealings with foreign nations does. The federal taxing power is in no way impinged; clearly the federal government can tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax. Nor is there a general sovereign interest in preventing persons from being taxed by governmental entities other than itself.

A national, if not sovereign, interest in preventing deprivations of property without due process is manifested in the Fifth and Fourteenth Amendments. In the context of taxing, however, that interest is implicated only in the extremely rare case in which the taxing power is so abused the result is in reality not a tax, "but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." A Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934). *See also* City of Pittsburgh v. Alco Parking Corp. 417 U.S. 369 (1974); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910). That is not the situation in the instant case.

Neither can we conclude that the "national interest in free and open trade" between the states, expressed by the Commerce Clause of the Constitution precludes tribal taxation. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). Just as the clause serves only as a limitation on state taxation

powers, *id.* at 329, it limits but does not destroy tribal powers of taxation. *See* Part III, *infra.*

We recognize that in recent decisions bearing on the issue of inherent powers of Indian Tribes, the Supreme Court has occasionally employed language suggesting that Indians are without inherent powers over any nonmembers of their tribe. *See* Wheeler, 435 U.S. at 326; Oliphant, 435 at 208-11. For instance, the Court in *Wheeler* described powers not retained by tribes as those that "would necessarily be lost by virtue of a tribe's dependent status." 435 U.S. at 326. For several reasons we do not believe this language was intended to dispose of a case like the one at issue here.

First, the formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained, and is not a *test* for determining the existence of inherent powers. The critical factor in the cases is whether important interests of the United States, other than Congress' basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority. If the test is whether the asserted tribal power is inconsistent with its dependent status, then the focal point becomes the tribal position, which is *always* one of dependence upon the United States. Carried to its logical conclusion, such a test would mean that a tribe possesses no inherent powers even over its members, because the tribe's very existence would depend upon affirmative enabling legislation by Congress. To the extent a tribe could exert power over its members, that power could only derive from the tribe's existence as a private, voluntary association. These conclusions are fundamentally inconsistent, of course, with the teachings of other decisions of the Court. The Court has expressly rejected the contention the tribes are no more than private, voluntary associations, United States v. Mazurie, 419 U.S. 544, 557 (1975), and has consistently held that tribal powers of self-government are inherent, derived from the tribe's original status as independent sovereign

nations. *E.g.*, United States v. Wheeler, 435 U.S. 313, 322-323 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

Also persuasive are Supreme Court decisions to the effect that the tribe's retained powers have at least some elements of territoriality. As early as 1823 the Court recognized in Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1923), that voluntary transactions of nonmembers with the Tribes or their members within the confines of the reservation would subject that nonmember, at least regarding that transaction, to the laws of the tribe. *Id.* at 593. Similarly, Williams v. Lee, 358 U.S. 217 (1959), held that a state court was without jurisdiction to hear a simple contract action brought by a nonmember against an Indian concerning a transaction entered into on the reservation. The Court's stated rationale was premised in part upon the territorial aspect of the tribe's right to self-government.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted). *See also* United States v. Mazurie, 419 U.S. 544 (1975). While the territorial element of inherent tribal power is not necessarily exclusive, *see, e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Thomas v. Gay, 169 U.S. 264 (1898), and may not exist in some circumstances, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), we do not think the decisions eliminate this aspect of tribal powers.

We are also persuaded by "the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts," Oliphant, 435 U.S. at 206, that the tribes retain the

power to levy a tax that falls upon nonmembers doing business on the reservation. Prior to the Indian Reorganization Act of 1934, 25 U.S.C. §476 (the Act), which was intended to facilitate tribal self-government, one decision by the Supreme Court and three by the Eighth Circuit approved imposition of tribal taxes on nonmembers doing business on the reservation. *See* Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed without opinion,* 203 U.S. 599 (1906); Maxey v. Wright, 105 F. 1003 (8th Cir.) *aff'd* 3 Ind. Terr. 243, 54 S.W. 807 (1900); Crabtree v. Maxey, 54 F. 426 (8th Cir. 1893). The Attorney General of the United States also approved similar taxes. *E.g.,* Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901); Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884).

The parties to this appeal forcefully dispute the characterization of these decisions — the Tribe argues these decisions involved the inherent power to tax; the lessees argue they merely support the proposition that tribes have the proprietary, but not sovereign, right to exact fees from persons desiring to enter the reservation and do business therein. From our reading of the cases and opinions, we conclude that the decisions were grounded upon tribal sovereignty, with the exception of Choctaw and Chickasaw Permit Laws, 18 Op, Att'y Gen. 34 (1884). But two different sovereign powers have been relied upon — the power to tax, *e.g.,* Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the power to exclude nonmembers from the reservation and set the terms upon which such persons could enter and do business therein. *E.g.,* Buster v. Wright, 135 F. at 950. The Supreme Court in *Morris* v. *Hitchcock* appears to have recognized both theories. 194 U.S. at 389-93.

The case before us presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty. Thus, it seems important to ascertain whether particular treaties influenced the decisions discussed above. Although the

United States did not always require tribes to give up the power to exercise civil jurisdiction over nonmembers and their property within the reservation, *see, e.g.*, Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att'y Gen. 174, 176 (1855), nearly all of these tribes had done so. *See, e.g.*, Morris v. Hitchcock, 21 App. D.C. 565, 593 (1903), *aff'd*, 194 U.S. 384 (1904). Yet throughout the decisions is the sometimes explicit and sometimes implicit assumption that tribal exercise of power over nonmembers doing business on the reservation in connection with that business did not offend the interests of the United States and was a sovereign right retained by the tribes. Two cases decided by the Eighth Circuit after passage of the Act expressly upholding tribal taxes on the theory of the power of taxation share this assumption. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

Congress also apparently recognized tribal power to tax nonmembers within the reservation when it passed section 16 of the Act, which confirmed the existence of sovereign tribal powers generally. In hearings conducted prior to passage of the Act, Congress was apprised of the holding of Buster v. Wright, 135 F. 947 (8th Cir. 1905). *See To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes of Local Self-Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. on Indian Affairs*, 73rd Cong., 2d Sess. 269-70 (1934). Solicitor Margold of the Department of Interior, in an opinion, considered the intent of Congress in its reference in section 16, to "all powers vested in any Indian tribe or tribal council by existing law." Among those retained powers, he concluded that

> [c]hief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept

> privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1934). This opinion, virtually contemporaneous with the Act, is persuasive evidence that neither Congress nor the Department of Interior believed a tribal taxing power would conflict with the interests of the United States. *See also* United States Department of the Interior, Federal Indian Law 435-39 (1958); 1 Final Report of the American Indian Policy Review Comm'n 154-58, 178-82 (1977). Consistent with its interpretation of the Act, the Department approved the tax involved in this case. As the agency charged with construction of the Act in the course of its actual execution, the Department's conclusion that Indian tribes retain the power to levy a tax of the type involved here deserves great respect. *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976).

Except for the dollar sums involved, which are irrelevant, *see* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), we see no essential difference between the privilege taxes here levied and those approved by the Supreme Court in *Morris* v. *Hitchcock* and in the Eighth Circuit cases cited above. For all the reasons discussed above, we conclude that the Tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers.

III

We now consider the argument that the severance tax violates the Commerce Clause. The Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. We believe the national interest manifested in the Commerce Clause is not sufficient to preclude the tribes' power to tax, but this clause of its own force limits the power of the tribes as well as the states. *See* Boston Stock Exch. v. State Tax

Comm'n, 429 U.S. 318, 328 (1977). It has long been established that the tribes constitute a separate category within that clause. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831). Since the tribes are not "states," *see id.* at 16, United States v. Wheeler, 435 U.S. 313 (1978), and necessarily are located within the boundaries of one or more states, they are not subject directly to those doctrines implementing the phrase "among the states."

It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. We hold the standard to be used in applying that clause is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade. Our view is that this national interest is measured by traditional analyses. The trial court found the tax imposed by the tribe both discriminates against interstate commerce and constitutes a multiple burden on commerce. We treat first the discrimination question.

The trial court's stated reason for holding the tax discriminates against interstate commerce is that the tax "is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation." This reason, which simply tracks the language of the ordinance, can be interpreted in two ways.

The first interpretation is that the tax provides "a direct commercial advantage to local business." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)). Although there actually is no Indian production here, the ordinance by its terms would apply to any operator engaged in severing the subject resources within the reservation. Apparently, the trial court viewed the provision exempting "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" as the requisite local preference. We disagree. Subjecting royalty products the Tribe would receive to its

own tax would be a fruitless and wasteful act. We therefore think the exemption is permissible.

Second, in view of the trial court's finding that eighty percent of the hydrocarbons produced on the reservation entered interstate commerce, which we accept as true for purposes of this appeal, the court's conclusion of law can mean it believed the tax is to be levied on the privilege of engaging in interstate commerce itself. Were this correct, the standards of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), and Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978), would be applicable.[4] However, it is settled that an occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). *See* Dunbar-Stanley Studios, Inc. v. Alabama, 383 U.S. 537, 541 (1969); Alaska v. Arctic Maid, 366 U.S. 199 (1961); Hope Natural Gas Co. v.

[4] The *Stevedoring* case, building upon *Complete Auto Transit* eliminated the distinction between direct and indirect taxation of interstate commerce when the tax is measured by gross proceeds. 435 U.S. at 743-51. With that distinction fell the *per se* rule forbidding taxation of interstate commerce. *Id.;* 430 U.S. at 287-89. A tax falling within the ambit of these cases is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. *See id.* at 287; 435 U.S. at 750-51. We need not decide whether a severance tax measured by quantity produced within a single jurisdiction falls within the ambit of this new doctrine. Obviously the questioned tax falls on activity — production — with a substantial nexus with the reservation. The tax does not raise the apportionment problem because it is measured by quantity, and as we have determined, it does not discriminate against interstate commerce. If the *Stevedoring* and *Complete Auto Transit* analysis applied, the only question is whether the tax is fairly related to services provided by the reservation. Lessees did not build a factual foundation in the record to challenge the tax on this ground, since they relied upon the rejected *per se* rule. Thus there is no basis on which to hold the tax invalid on this ground. *See* 435 U.S. at 750-51.

Hall, 274 U.S. 284 (1927). This is true even though the severed product is destined for immediate entry into interstate commerce, Arctic Maid, 366 U.S. at 204; Oliver Iron Mining Co., 262 U.S. at 177-78, and even though the cost of interstate commerce is increased. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 612 (1938). *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977). The Tribe's tax fits within this line of cases.

The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

The trial court also held the tax invalid as a multiple burden on interstate commerce, apparently because New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an oil and gas production equipment ad valorem tax. *See* N.M. Stat. Ann. §§7-29-1 to 7-29-22; *id.* §§7-31-1 to 7-31-25; *id.* §§7-30-1 to 7-30-26; *id.* §§7-34-1 to 7-34-20 (1978. The Supeme Court, in Western Live Stock v. Bureau, 303 U.S. 250 (1938), explained

the basis for finding this type of violation of the Commerce Clause as follows:

> The vice characteristic of [local taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed ... or added to ... *with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Id. at 255-56 (citations omitted) (emphasis added). Applying this analysis, we hold the trial court erred.

We first note that the focus is upon the type of tax that every state may impose with equal right. It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation. There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause. That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of interstate commerce at all, we believe. Rather it raises two different questions — whether the *state's* tax interferes with the federal interest in regulating the affairs of the Indians, a question we do not reach, and whether a Congressional grant of authority to levy the state tax preempts tribal taxation, addressed in Part IV, *infra.*

We hold the federal interest in interstate commerce, manifested in traditional Commerce Clause analyses, does not limit the Tribe's power to impose this tax.

IV

We next consider whether Congress has preempted the exercise of the Tribe's power to levy the severance tax. The trial court held that by granting to the states the right to tax the production of oil and gas on executive order reservations, Congress intended to preempt similar tribal taxation. The basis of this ruling is 25 U.S.C. §398c, which provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided,* That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Emphasis in original). Section 398c was an integral element of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, which also settled then unresolved questions concerning the status of Indian mineral rights in executive order reservation lands and granted to the Indians all the royalty, rental and bonus income from oil and gas leases on their reservations. *See id.* §2, 44 Stat. 1347 (codified at 25 U.S.C. §398b). *See also* SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926).

In construing this statute, we must apply the

> "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918). See *Choate* v.

Trapp, 224 U.S. 665, 675 (1912); *Antoine* v. *Washington*, 420 U.S. 194, 199-200 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976). Fairly read, this statute does not by its terms preclude tribal taxation of lessees engaged in the business of producing oil and gas from within executive order reservations. Moreover, the legislative history, which reflects Congress' awareness of the need at that time for express authorization of state taxation of Indians and of non-Indians doing business with Indians on the reservation, does not show an express or implied intent to preempt tribal taxation. *See* H.R. REP. NO. 1791, 69th Cong., 2d Sess. 4 (1927); SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926); 68 CONG. REC. 4569-81 (1927); 67 CONG. REC. 10912-25 (1926); 66 CONG. REC. 2233-34 (1925); 66 CONG. REC. 998-99 (1924).

A careful reading of the legislative history convinces us that Congress simply did not think of the issue when it enacted the statute, even though the Supreme Court and the Eighth Circuit had approved tribal taxation of non-members under similar circumstances. *See* Part II, *supra*. There was dispute over whether the Indians should receive all of the royalty income from leases of reservation lands. Legislators who opposed the Act as too generous might well have voted against giving the Indian tribes power to levy taxes, but the majority, who obviously thought that all benefits from the minerals on the reservations belonged to the Indians, might well have voted the other way. At no time when the state taxes were mentioned was there any discussion that the amount of such taxes might be relevant to passage of the Act. We therefore conclude that section 398c, being part of an act passed to benefit the Indians and ambiguous in letter and intent with respect to tribal taxation, does not preempt the tribal tax ordinance at issue in this case.[5]

[5] The Tribe also argues that New Mexico has no power to levy its severance tax on production within the reservation. Its argument in essence is that the General Leasing Act of 1938, ch. 198, 52 Stat.

It also may be argued that by virtue of its regulation of the leasing process, Congress preempted independent tribal taxation of those acquiring leases by that process. *Cf.* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (all-inclusive federal regulations and statutes applicable to trading on the reservations with Indians preempt state taxation of traders doing business thereunder). In essence, the argument is that by prescribing the procedures for the acquisition of leases and determining the royalty, bonus and rental payments the Indians are to receive, Congress intended that no burdens other than those embodied in the leases be imposed on the lessees.

When Congress first authorized leasing of land within executive order reservations for oil and gas purposes in the Act of March 3, 1927, ch. 299, §1, 44 Stat. 1347 (codified at 25 U.S.C. §398a), it provided that the same rules apply as for leasing oil and gas interests on other types of reservations. *See* 25 U.S.C. §§397,398. Thus, the Secretary of the Interior, with the consent of the tribal council, was charged with the responsibility of conducting a public auction to obtain the best terms possible for the Indians. *See* 25 U.S.C. §398. But in 1938 Congress effected a change in this scheme that is significant for our purposes. The General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§396a-396g), intended to make uniform the various laws applicable to the leasing of Indian lands for mining purposes and to conform the laws to the purposes of the Indian Reorganization Act of 1934, §§16, 17, 25 U.S.C. §§476,477. *See*

---

347 (codified at 25 U.S.C. §§396a-396g), which makes uniform the laws applicable to leasing of mineral rights on Indian reservations, and does not contain a specific grant of power to the states comparable to that found in the Act of March 3, 1927, ch. 299, §3, 44 Stat. 1347 (codified at 25 U.S.C. §398c), repealed the latter provision. See §7, 52 Stat. 347. Because the State of New Mexico is not a party to this litigation and we hold the State's power to tax, if any, is not exclusive, we do not reach this question. For the same reasons we do not address the Tribe's contention that the trial court erred in not allowing the Tribe to put the leases into evidence to show whether they were granted under §398c or under §396a.

H.R. REP. NO. 1872, 75th Cong., 3d Sess. (1938). Therefore, it elaborated on the procedures to be followed for leasing oil and gas interests. But of greater significance is the proviso found in that section, which allows tribes organized and incorporated under 25 U.S.C. §§476, 477 to assume and define for themselves the leasing process.[6]

Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. § 476, determine the terms upon which they will lease their lands and regulate the operations of their lessees.[7] Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas

---

[6] 25 U.S.C. §396b provides:

> Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such adverisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 464-475, 476-478, and 479 of this title.* (Emphasis added).

[7] The Secretary of the Interior has implemented by regulation the substance of the proviso as follows:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action

leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues. It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." City of St. Louis v. United Rys. Co., 210 U.S. 266, 280 (1908). *See also* New Orleans City & Lake R.R. v. City of New Orleans, 143 U.S. 192 (1892).

We have considered the remaining contentions of the parties and do not find them to be dispositive.

The judgment of the trial court is reversed and remanded with direction to enter judgment in favor of appellants.

Nos. 78-1154 and 78-1251

J. GREGORY MERRION, et al. v.
JICARILLA APACHE TRIBE, et al.

McKAY, Circuit Judge, concurring:

While I concur fully in the opinion of the court, I file this statement to emphasize certain considerations dictating the result reached.

As the dissenting opinion of the Chief Judge suggests, the time in history at which one begins his analysis certainly does affect the outcome. For the most complete examination, we should

---

authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. § 171.29 (1979).

begin in pristine times, or at the very latest with 1788 and the ratification of our fundamental law. At that moment there were at least four, not three, entities recognized by the Constitution. There was, of course, the federal government. There were, of course, the states. There were, of course, foreign nations. And there were "the Indian Tribes."[1]

Beginning with the ratification of the Constitution, it is essential to examine both the actual dealings with the tribes and the language employed in those dealings in order to comprehend the tribes' special status. Even the conquering government characterized them as "nations." The early Supreme Court decisions incorporate those national concepts as, for instance, in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall wrote: "[A] weaker power does not surrender its independence — its right to self government, by associating with a stronger and taking its protection." *Id.* at 561. Both the language and formality of treaties were employed in defining the tribes' special status. Indeed, "[t]he Indian tribes were recognized as powers capable of making treaties before the United States was." F. Cohen, *Handbook of Federal Indian Law* 274 (1942).

The source of cession of Indian lands is of relatively little consequence. Whether the lands came from the exaggerated claims of dominion asserted by France, Spain, Russia, or Mexico, our government continued to treat the Indian tribes with the same essential assumptions. For example, the President negotiated and the Senate ratified a treaty with the Mescalero Apaches — a nation of Indians living within the land ceded by Mexico — only four years after the Treaty of Guadalupe Hidalgo. *See* Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852). In no sense, then, were all vestiges of governmental

[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. 1, § 8.

power abolished in the New Mexico tribes. Thus, we see that the Indians were never treated as mere corporations, mere landholders or mere associations. While it is true that Congress did not formally ratify the proposed treaty with the Jicarilla, that fact does not derogate from the general underlying assumptions about the tribe's historic status. A congressional failure to ratify a treaty does not convert a "nation" into a voluntary association. The profile of the tribe's rights, practices and relationships under federal authority properly reflects a status similar to the tribes whose proposed treaties were indeed ratified. "Executive order reservations have exactly the same validity and status as any other type of reservation." F. Cohen, *Handbook of Federal Indian Law* 299 (1942) (citing 34 Op. Att'y Gen. 181, 186-89 (1924)).

Tribes have characteristics of sovereignty not enjoyed by the kinds of proprietary and fraternal bodies which the Chief Judge asserts are most analogous to the tribes. If we were to deny the importance of sovereignty in our analysis, we would be ignoring the clear dictates of the Supreme Court. *See, e.g., Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 172 (1973). Indeed, the Court has consistently held the tribes to have the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58.

Indian "self-determination" is not in substance the same as that of any voluntary association. *Congress* has explicitly "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1976). And the principle of self-determination may be said to *require* protection of territoriality. *See* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests,* 13 Harv. C.R.-C.L. L. Rev. 357, 390 & 390 n.154 (1978).

Even though *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), shies away from the prospect of non-Indians answering to Indian tribunals for *criminal* behavior, it nonetheless confirms that tribes enjoy sovereign powers not remotely granted to corporations, voluntary associations, and the like. *Id.* at 208. Those powers may be subject to divestiture by the superior federal power, but such divestiture is implied only if the powers are inconsistent with the tribes' status. *Id.* In a limited area, *Oliphant* found divestiture, but "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash. L. Rev. 479, 508 (1979). Tribes clearly do have governmental authority over nonmembers in many instances. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property intersts of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 65. *See United States* v. *Mazurie,* 419 U.S. 544 (1975); *Williams* v. *Lee,* 358 U.S. 217 (1959).

The reservation tribes, including the Jicarilla, typically and with congressional approval have operated as governments. There can be no doubt that the federal government, because of the special authority granted it in dealing with the Indians, has the power either to confirm in them or to grant to them typical municipal powers whether they be police powers, regulatory powers or fiscal powers. It simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes. Such taxes certainly do not offend the concerns expressed in *Oliphant* because historically and conceptually these taxes are associated with land, even though the impact may ultimately fall on individuals, Indian or non-Indian.

Finally, because the case is so often cited, I think it important to emphasize that *Puyallup Tribe, Inc.* v. *Department of Game,* 433 U.S. 165 (1977), provides no authority whatsoever for the State of New Mexico to assert jurisdiction over Indian reservations. The Chief Judge correctly notes that the case upheld the right of the State of Washington to regulate the netting of steelheads by individual Puyallup Indians. However, unlike New Mexico, Washington had explicitly asserted Public Law 280 "civil and criminal jurisdiction within the [Puyallup] reservation for most purposes." *Id.* at 175, 175 n.14. In addition, in contrast to the Jicarilla reservation, the Puyallup reservation has ceased to exist for all practical purposes. The Puyallups have alienated all but 22 acres of their 18,000 acre reservation, and none of the remaining 22 acres abuts on the river in question. *Id.* at 174. Furthermore, although the Jicarilla Apaches have not done so, a tribe may voluntarily relinquish some of its jurisdictional rights. In *Puyallup Tribe,* the Court interpreted the relevant treaty as permitting state regulation. *Id.* at 175.

No. 78-1154

J. GREGORY MERRION, et al. v.
JICARILLA APACHE TRIBE, et al.

No. 78-1251

AMOCO PRODUCTION COMPANY, et al. v.
JICARILLA APACHE TRIBE, et al.

SETH, Chief Judge, dissenting:

I must dissent from the majority opinion for several reasons.

I would begin the analysis of the issues presented in this appeal at a very early date to place the matter in its historical context. Thus, in my view, the consideration of this appeal should *not* start with an analysis of "sovereignty," as the Secretary urges, as this includes too many assumptions and generalizations which are questionable but which nevertheless influence the outcome. As so often happens when a start is made too far

along the sequence of events or the development of doctrines the selection of a place to start determines where the writer is going to come out. Thus I would start instead with an examination of the fundamental relationships as they existed initially between the federal government and the Jicarilla Apaches, and this relationship as influenced by the creation of the State of New Mexico.

The Jicarilla Apaches were then and now are in the area ceded to the United States after the war with Mexico. The Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922) contained provisions for the recognition of land titles, and the proprietary interests of the citizens of Mexico within the area ceded. No separate mention is therein made of Indian lands or any recognition given to Indian groups other than border problems. These groups had been under the rule of Spain and of Mexico for two hundred years. They were in an area settled by Spain and Mexico and in frequent contact over the years. The Pueblo Indians had received grants of land as had non-Indian groups. The Treaty treats all persons within the ceded area in the same way. The Treaty of Guadalupe Hildago thus spoke for all persons within the geographical area concerned, as would any treaty. There was no separate treatment of particular areas or groups and there was no reason why there should have been. All persons had been subjects of the Spanish crown and the government of Mexico for several hundred years. The sovereignty was thus *transferred* from the government of Mexico to the United States. This was not an area being occupied by the first foreign sovereign to come on the scene wherein it would be expected that the various groups of inhabitants would be dealt with separately or differently. Instead it was the conclusion of a war between two nations one of which, with its predecessor, had exercised complete authority and sovereignty over the land and all the people for several hundred years. With the end of the war and the peace treaty all the persons in the ceded area who stayed automatically came under the complete authority of the United States. They

were thereby transferred from one sovereign to another. The citizenship issues have been treated by a number of authorities and need not be considered here because there is no question as to the complete authority of the new sovereign over all the people as a consequence of the Treaty with Mexico and the position as a successor.

At the end of the Spanish occupation there were in New Mexico and Arizona some six or eight independent Apache tribes. One of these was the Jicarilla Apaches. In 1846 after the period of Mexican sovereignty the Jicarillas numbered about 500 according to Governor Bent. There were then in all ten to twelve groups, each consisting of eight to ten family units, with a total of about forty-five individuals. Albert H. Schroeder, *Apache Indians I* (Garland Publishing Co. reprints, reports and exhibits) [hereinafter cited as Schroeder]. The basic unit was the family group. There were no clans or gentes, M. E. Opler, referring to the Jicarillas (as quoted by Schroeder), writes:

> "The Tribe was a rather nebulous entity of its members. The band was a man's immediate concern.
>
> . . . .
>
> "They were semi-nomads, following wild food harvests.
>
> . . . .
>
> "The people living in one section of the tribal range would seldom meet their tribesmen of a more distant quarter."

Opler also writes that the local groups would form a loose confederation for social purposes, and for defense or aggression. When the small units banded together for war a leader was accepted by agreement, but each individual was free to come or go at will or reject the leader (Schroeder). As early as 1796 Colonel Don Antonio Cordero, as to all Apaches, reported (per Schroeder): "At present they do not compose one nation of uniform customs, usages and tastes." There was, of course, no central authority for the Jicarillas at any time. Each autonomous group would winter around their geographic

landmark near the Sangre de Cristo Mountains, and in summer move about with the availability of food, and move eastward to hunt buffalo. These groups used an area of some 5,000 to 7,000 square miles. *See generally* H.R. Rep. No. 2503 (1953). There was thus self-determination within the socio-religious-family relationships. This went with the small groups wherever they went as it had no geographical significance nor relationship to any other group. There were several small groups who farmed near Taos and Cimarron. For descriptive purposes the Spanish referred separately to the eastern groups, the Sand group, and the more western group. An eastern group leader was dealt with for a time in the pre-American period.

The Treaty of Guadalupe Hidalgo and the American occupation necessarily displaced all existing authority in the area, and there were then created the only governmental entities in New Mexico which were to exist during the interim period. Thus a new government came on the scene to supplant entirely the old. This was not an unfamiliar event in the history of the world.

Thus with the substitution of the government of the United States for the government of Mexico all the individuals in the area started anew with only their property. Thus there is nothing to build on in New Mexico to create a concept of sovereign power in any group remaining from Spanish or Mexican times. The start is from a zero base with the American occupation for all persons in the area. This new structure was established by the code promulgated by General Kearney in September of 1846. It was a complete code of laws and created the framework of the government with many details. Thus there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy pueblos. The Jicarilla Apaches had no such powers over others, and if they had any they would have been lost by the American occupation.

The act organizing the territory of New Mexico was effective in September of 1850 (9 Stat. 446). This was a skeleton of

organization and contained no mention of land ownership nor of the Indians. This was followed by the Enabling Act for the State of New Mexico (36 Stat. 557, Act of June 10, 1910). This Act contains the first reference to the Indians as a group. This Act recognized them only as landowners or possible landowners. The Act as to non-Indians provides in part that "people inhabiting said proposed state" disclaim all proprietary claims to the lands of the United States and of the Indians. The Act also acknowledges the exclusive jurisdiction in Congress over Indian lands. This disclaimer is by the "people" and only of *proprietary* interests. It has nothing to do with a disclaimer of sovereign power of the state, and again relates only to lands in an attempt to retain the status quo, and the rights under the Treaty of Guadalupe Hidalgo.

The Enabling Act, of course, contemplated the creation of a state under the United States Constitution with the vesting of broad powers in the new state. The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundation of governmental authority as it exists in the United States. Not only are there no federally created governmental entities within the states provided for by the Constitution, but it also does not contemplate the existence of other "nations" within the boundaries of the United States. Obviously there is no place for them in the governmental structure therein created.

It is significant in this respect that the Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, quoted from United States v. Kagama, 118 U.S. 375, the following:

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.' "

As to the Jicarillas, long after the American occupation legislation began to fill the vacuum as to their internal matters, their relation with the federal government and New Mexico, their money, and their tribal businesses, but all within Constitutional limitations. The place or location in New Mexico to be occupied by the Jicarillas after the American occupation changed several times. There were a series of executive orders promulgated and revoked. Finally, a location was established and the Executive Order recites that a described tract is "set apart as a reservation for the use and occupation of the Jicarilla Apache Indians." This is obviously something other than "ownership" but for our purposes it is no different from any other real estate "owned" by an individual or a group. It is no different from the Spanish and Mexican community land grants existing and recognized in New Mexico from the earliest times. These grants are also managed, used, and owned by groups in a community. The combination of land ownership and self-determination for anyone does not add up to anything more than the elements separately considered. The combination does not create a governmental agency or entity recognized or contemplated by the Constitutions of the United States or of New Mexico.

The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is as it should be for self-determination; however, such a group of tribal members

excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on representation with an opportunity to participate. When this is provided authority exists to govern. Here we cannot add the exclusive group self-determination to land ownership and come out, as to the outsiders, with anything more than the rights of a private landowner. "Self-determination" for such an exclusive group is in substance what any socio-religious group has in this country, and should have. If such group owns a tract of land, there is the same combination of self-determination and private property which again adds up to private property as to non-members. This is typical of community land grants in New Mexico. The added element as to the Jicarillas is the control by Congress and the limited land "ownership." These for all practical purposes must be negative elements.

The plenary power of Congess over the Indians and their lands is obvious, but is must be recognized as a power "over the Indians" and not a power over non-Indians. The power of Congress over the Indians and their lands cannot include the exercise of such power to diminish the rights of non-Indians. To do so is to exercise plenary power over non-Indians. Thus Congress cannot under the Constitution add sufficient elements or powers to such an exclusive tribal group any more than it can to any other socio-religious group which would enable the members to exercise governmental powers of any nature in New Mexico.

The Secretary here urges that the Reorganization Act added some new ingredient of a governmental nature. Under the Constitution Congress cannot add new governmental entities in New Mexico not theretofore provided for. The federal government cannot by the Reorganization Act or by any other method introduce "nations" or governmental entities within the state. The Reorganization Act is an aspect of the current policy of the federal government seeking to cast self-determination machinery

in a form in which it is accustomed to, and which has a "governmental" appearance. The whole concept of self-determination should be taking place and should have been advanced in years past. All must agree that it is most desirable, and to be valid it must be recognized for what it really is — "self-determination."

It is a mistake to generalize about "Indian rights," wherever the groups may be in the United States, and to disregard the events in their history, in the history of the states where they may now be located, and the events and sequence of such events in the history of the United States. The differences are too great to permit the broad generalizations which are urged on this appeal by the Government or the basic assumptions made therein.

The State of New Mexico under specific federal statutes and under its sovereign powers has extensive jurisdiction within Indian reservations which it may choose to exercise or not to do so. The Supreme Court in Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, considered and upheld the right of Washington State to control the netting of steelheads by individual Indians within the Puyallup Tribe's reservation. *See also* Kake Village v. Egan, 369 U.S. 60.

The Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, referred to the many instances where the Court has referred to the limited authority retained by Indian tribes. The Court therein refers to the "quasi-sovereign" reference in the Cherokee Nation v. Georgia, 5 Pet. 1, and then states:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'* " (Emphasis supplied.)

The Court refers therein to Johnson v. M'Intosh, 8 Wheat, 543, and states that:

> "We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States."

The Court continued:

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereinty of the United States as follows: '[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*' " (Emphasis supplied.)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, is a significant decision by the Supreme Court. It is, of course, directly concerned with the authority of an Indian tribe to exercise criminal authority over a nonmember. The decision, however, carries a parallel analysis and statement of reasons applicable to jurisdiction or power by the Indians over all matters relating to nonmembers. We have above referred to portions of the opinion and the references to other Supreme Court opinions therein contained. The decision represents, together with United States v. Wheeler, 435 U.S. 313, a description of Indian "sovereignty" after all its restrictions and limitations are applied, as authority over members of the tribe. This is "self-determination"as it now exists. The Court in *Wheeler* said:

> "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a

> separate people, with the power of regulating their internal and social relations.' *United States* v. *Kagama, supra,* at 381-382; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16."

In a footnote to the above, the Court added:

> "Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases,* 203 U.S. 76 *Roff* v. *Burney,* 168 U.S. 218, 222-223; to regulate domestic relations among tribe members, *Fisher* v. *District Court,* 424 U.S. 382; *cf. United States* v. *Quiver,* 241 U.S. 602; and to prescribe rules for the inheritance of property. *Jones* v. *Meehan,* 175 U.S. 1, 29; *United States ex rel. Mackey* v. *Coxe,* 18 How. 100."

The Court in *Wheeler* continued:

> "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

And again:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

And again:

> "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its

> independence — its right to self government, by associating with a stronger, and taking its protection.' "

These quotations are especially significant when we consider the history of the Jicarillas, and the zero base from which they started into the American occupation. Even in United States v. Mazurie, 419 U.S. 544, the Court referred to the tribe there concerned as possessing "a certain degree of independent authority over matters that affect the internal and social relations of tribal life."

The two principal cases considered — *Oliphant* and *Wheeler* —, of course, concerned criminal jurisdiction, but again the reasoning and analysis upon which the decisions are based is equally applicable to other "jurisdiction" or "powers" over nonmembers which would originate with any concepts of governmental status or an aspect of sovereignty. *See also* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165. These several recent decisions, in my view, are determinative of the issue on appeal.

Thus under the most recent cases "Indian sovereignty," if it may be generalized, means self-determination. It means the right of the Jicarillas to control their internal business-governmental affairs relating to tribal members and, of course, their social and religious affairs. This is added to the usual rights which accompany the ownership of property both real and personal. These rights taken together do not include the taxation power here sought to be exercised. In contrast to the many license cases cited by the parties, if there is a license it is the executed oil and gas lease. The tribe is as any other landowner in relation to the lease for the purposes under consideration.

I would thus affirm the trial court.

Nos. 78-1154 and 78-1251

MERRION, et al v. JICARILLA APACHE TRIBE and ANDRUS, SECRETARY.

BARRETT, Circuit Judge, dissenting:

I.

In *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116, (10th Cir. 1979), we discussed the unique relationship between the United States Government and the Indian Tribes:

> Since the year 1871, Indian tribes have been subject to the power and authority of the laws of the United States by means of the exercise of its legislative power over them. Prior thereto the various tribes were recognized by the United States as possessing the attributes of separate nations to the extent that treaties were entered into with them. Thus, since 1871 the Congress has regulated Indian affairs and the United States government serves as guardian of the Indian tribes, nations, or bands. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902). It has been said that, in a general way, the relationship now between the United States government and the Indian tribes is that of superior and inferior, in that the government has assumed, in large measure, the care and control of Indians and Indian Tribes. *Montoya* v. *United States,* 180 U.S. 261, 21 S.Ct. 358, 45 L.Ed. 521 (1901). The paradox, so to speak, is that even though Indian tribes have been held to have a [sovereign] status higher than the states they are nonetheless limited in sovereign power to the extent required of them by the superior sovereign, the United States. *Native American Church.* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Circ. 1959).
>
> Congress possesses paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to the control of the judicial branch of government. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 23

S.Ct. 216 47 L.Ed. 299 (1903). The propriety or justification of action by the Federal Government, legislatively mandated, relative to Indian lands and properties is a political rather than a judicial question and that power is plenary. *Oneida Indian Nation* v. *County of Oneida, supra; United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).

It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

601 F.2d at pp. 1125, 1126.

In the exercise of the elusive concept of "tribal sovereignty", the courts have been able to readily define the limits thereof only if a federal statute or treaty speaks directly to the subject, i.e., the power of an Indian tribe to exercise a particular jurisdiction. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); *Bryan* v. *Itasca County, Minnesota,* 426 U.S. 373 (1976). Thus, any general federal law fails if it conflicts with or abrogates a tribal treaty right. *United States* v. *Winnebago Tribe of Nebraska,* 542 F.2d 1002 (8th Cir. 1976). The two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Tribes do, however, retain those aspects of "sovereignty" not withdrawn. *United States* v. *Wheeler,* 435 U.S. 313 (1978).

Indian treaties have not been interpreted narrowly, but have been construed so as to generously recognize the full obligation of the United States to protect the interests of a dependent people. *Peoria Tribe of Indians of Oklahoma* v. *United States,* 390 U.S. 468 (1968). Accordingly, all doubtful expressions contained in treaties should be resolved in the Indians' favor, *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), although

the Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. *Lone Wolf* v. *Hitchcock, supra.*

In the instant case there are no treaty rights involved, inasmuch as the Jicarilla Apache Tribe Reservation was carved out of the public domain and withdrawn by Executive order. A tribe occupying lands under a treaty has rights which are contractual in nature; however, a tribe occupying reservation lands by virtue of an Executive Order does so at the will of the Congress. Under either circumstance, i.e., creation of Indian reservations by treaty or Executive order, the exclusive plenary legislative authority of the Congress is superior *when exercised.* The "jurisdictional" problem relating to the applicable law of "Indian country" was discussed in *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979).

> Before the enactment of the state law here in issue, the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester* v. *Georgia*, 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 219-220.7. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164, 170-171.
>
> 439 U.S. at pp. 470, 471.

The Congress, of course, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of

Indian tribes. *United States* v. *Wheeler, supra.* This power was articulated in *United States* v. *Mazurie*, 419 U.S. 544 (1975).

> This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936). Thus it is an important aspect of this case that Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations. . .," *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164, 173 (1973).
>
> . . . *[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.* [Emphasis supplied].
>
> 419 U.S. at pp. 556, 557.

The Supreme Court has recognized that Indian Tribes have separate, distinct rights of self determination constituting them "quasi-sovereign tribal entities." *United States* v. *Wheeler, supra; Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). These rights flow from the historical recognition of tribal political independence in the context of tribal-federal relations first declared in *Worcester* v. *Georgia, supra*, which involved the applicability of certain statutes enacted by the State of Georgia relative to reservation lands of the Cherokee Tribe. The Court held that the State statutes were not enforceable. While recognizing that Indian tribes are independent political communities possessing attributes of sovereignty over both their

members and their territory, the Court nevertheless placed particular significance on the fact that the Constitution vested full control of Indian affairs in the Federal Government. In my view, the exclusivity of "control" indicated in *Worcester, supra,* was modified at least interpretive-wise, by subsequent Supreme Court decisions which recognized the power of the states in specific areas over Indians and reservation lands providing that the power exercised does not infringe on the tribal powers of self-government which are part of the doctrine of tribal sovereignty, and, thus, those "inherent powers of a limited sovereignty" referred to in *United States* v. *Wheeler, supra.*

Applying the foregoing test, I conclude that it is incumbent upon the courts, on a case-to-case basis, to carefully scrutinize the power to be exercised in terms of the intended purpose and the interest to be served. Neither treaties or statutes dealing with Indian affairs relate or "speak" to many of the "jurisdictional" conflicts which have surfaced.

If statutes and treaties provide clear guidance relative to Congressional intent, no further inquiry is required. Thus, in the very area of our inquiry here (the power of the Indian Tribes to tax non-members on the Reservation lands) there are decisions upholding tribal tax assessments authorized by treaties, statutes or agreements with the United States. In *Morris* v. *Hitchcock,* 194 U.S. 384 (1904), the Supreme Court upheld an act of the Chickasaw Nation imposing an annual per head privilege or permit tax on cattle and other animals owned by a non-Indian who was grazing animals under a lease on the Reservation lands. The Court specifically found the tax assessment to be authorized under both the terms of treaties entered into with the Five Civilized Tribes, and the Curtis Act. In *Buster* v. *Wright,* 135 F. 947 (8th Cir. 1905) the Court upheld a "permit tax" imposed by the Creek Indian Nation in the nature of a percentile levy on all goods offered for sale by non-member traders doing business on the Reservation lands. The Court relied upon *Morris* v.

Hitchcock, supra, and *Crabtree* v. *Madden,* 54 F. 426 (8th Cir. 1893) in upholding the tax, i.e., the existence of the power and authority granted the Tribe under treaties and acts. Even so, the court did opine that in the absence of an Act of Congress, treaty or agreement with the United States, the Creek Nation would be empowered to impose the tax as ". . . one of the inherent and essential attributes of its original sovereignty." In *Crabtree* v. *Madden, supra,* the Court upheld an annual license tax of $200.00 assessed by the Creek Nation against non-member traders doing business on the Reservation based upon the power and authority reserved to the Tribe under the Treaty of August 7, 1856, 11 Stat., p. 703, Art. 15, which granted the Creeks the unrestricted right of self-government with full jurisdiction over persons and property within their limits. The Treaty provided that all person not members of the Tribe were to be regarded as "intruders" subject to removal unless traveling through or "trading therein under license".

If, then, there are no treaties, statutes and agreements granting such power, the courts have been compelled to engage in the "balancing of interests" process. In this circumstance, the Supreme Court has recognized that non-Indians and their property interests within Indian reservations are subject to licensing enactments or ordinances. *United States* v. *Mazurie, supra,* involved the inherent power of the Tribe to grant or deny a liquor license to a non-Indian liquor dealer operating a retail business on non-Indian lands within the boundaries of the reservation. In like manner, tribal hunting and fishing licenses governing non-members who enter the reservations to hunt and fish have been grounded upon the inherent powers of the Tribe. *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976).

There are other areas where courts have been compelled to engage in the balancing of interest process. Thus, in *Puyallup Tribe, Inc.* v. *Washington Game Department,* 433 U.S. 165

(1977), the State of Washington's conservation regulations dealing with an allocation of the total number of steelhead fish which could be netted by the Indians on the waters flowing through reservation lands was upheld as a proper conservation measure and not as an attempt to allocate the number of fish which could be netted by the tribe. To the same effect is *Organized Village of Kake* v. *Egan, supra.* The Court there upheld the State of Alaska's prohibition against the Thlinget Indians' use of salmon traps on waters flowing through the incorporated communities, notwithstanding Alaska's disclaimer in its Alaska Statehood Act relating to Indians, to-wit: (a) disclaimer of right and title to Indian property, and (b) recognition that the United States retains "absolute jurisdiction and control" over right and title of Indian property. *Enriquez* v. *Superior Court,* 565 P.2d 522 (Ariz. Ct. App. 1977) held that a tribal court had jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the reservation.

The Supreme Court has dealt with the "balancing of interests" problem in very few decisions. In *Oliphant* v. *Suquamish Indian Tribe, supra,* the Court held that Indian tribes lack criminal jurisdiction over non-members in the absence of specific Congressional authorization. The Court observed, *interalia:*

> Indian reservations are "a part of the territory of the United States." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority . ." *Id.,* at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations [are] necessarily diminished." *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574 (1823).
>
> 435 U.S. at pp. 208, 209.

The Supreme Court, in *Organized Village of Kake* v. *Egan, supra,* following a review of a number of its prior decisions in this area of concern, observed:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.
>
> 369 U.S. at p. 75.

The problems generated by the issue of the "exclusiveness" of federal jurisdiction were highlighted by this language contained in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973).

> . . . The upshot [of more individuality in treatment of certain treaties and specific federal statutes, including statehood enabling legislation as they, taken together, affect the respective rights of states, Indians and the Federal Government] has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. *Organized Village of Kake, supra* at 75; *Williams* v. *Lee,* 358 U.S. 217 (1959); *New York, ex. rel. Ray* v. *Martin,* 326 U.S. 496, 499 (1946); *Draper* v. *United States,* 164 U.S. 240 (1896).
>
> 411 U.S. at p. 148.
>
> *See also: United States* v. *Mazurie, supra.*

I would hold that the District Court did not err in finding that the Tribe's sovereign status does not extend to or allow the imposition of the challenged Tribal Severance Tax. In my view, the power of the Tribe to impose such a tax in these consolidated cases is clearly a political question which has not been explicitly addressed by the Congress. If the Congress intends that such power exists, it is incumbent that legislation be enacted explicitly so declaring. Until or unless the Congress affirmatively acts, I would hold that Tribe does not possess the right, power and authority to enforce the collection of its Tribal Severance Tax. My research discloses only two opinions which recognize the

inherent power of an Indian tribe to enact and enforce a tribal ordinance assessing a tax upon a non-Indian's income from business conducted within reservation boundaries. *Barta* v. *Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). I decline to adopt the broad interpretation of inherent tribal sovereignty — power laid down in these opinions, and adopted by the majority here.

A significant aspect of the issue before us here involves recognition that the United States Government, as guardian, has enacted much legislation and appropriated significant amounts of federal funds for the direct, specific and exclusive benefit of its Indian wards. In like manner, the various states wherein the tribes reside have rendered state governmental aid and assistance in many important areas, utmost of which is perhaps the maintenance of the public schools. To what extent the Congress intends its beneficial enactments and appropriations to serve as exclusive means, I do not know. It is, however, my view that this involves a legislative judgment in the nature of a political question. The question of what involves "essential tribal relations" referred to in *Williams* v. *Lee, supra,* is, in my judgment a political question.

In positing the "inherent sovereignty" issues presented here as a political question for Congressional determination, we recognize that the United States Government, out of avowed solicitude for the welfare of its Indian wards who were considered ". . . a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith," *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912), undertook by treaties, statutes and executive orders to establish legal relations between the United States Government and the Indian Tribes which ". . . resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). Implicit in the relationship thus created, in terms of "ownership"

of the property set aside for the use, occupancy and benefit of the Indian tribes, is the fact that legal title, with its attendant aspect of dominion and ultimate control, vests in the United States, as guardian, with the right of use, benefit and occupancy vesting in the Indian wards. That relationship between the United States Government and the various Indian tribes, however, was never intended to be one of Indian servitude. Thus, the Supreme Court has held that the power of Congress over Indian affairs, though plenary in nature, is not absolute and that the standard of review recently applied is that legislative judgments should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).

The "Indian Sovereignty" doctrine cannot be equated with governmental sovereignty of the United States Government. It is, however, of a "unique and limited character" existing at the sufferance of Congress and subject to complete defeasance. *United States* v. *Wheeler, supra*, at p. 323. Tribal self government is rooted in the current federal policy of promoting tribal self-government, *Bryan* v. *Itasca County, Minnesota, supra*, which advances the social, institutional, political and cultural values peculiar to the respective tribes. The basic right of Indian internal self-government is directed to their right "of regulating their internal and social relations," out of recognition of their "semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people." *United States* v. *Kagama*, 118 U.S. 375, 381 (1886).

II.

In the context of the above analysis of the current federal policy, I now consider the status of Congressional judgment in the area of the challenged Tribal Severance Tax in weighing the

preemption contention against the claim of inherent tribal sovereignty. If the Congress has explicitly addressed the subject matter, obviously there is no need for this Court to engage in the "balancing of interests" determination.

In my view, just as found by the District Court, there is clear congressional intent controlling in this case. I would hold that the enactment by the Congress on March 3, 1927, of 25 U.S.C.A. § 398c., 44 Stat. 1347, constituted clear, unambiguous legislative intent that only a "state or local authority" is empowered to levy and collect taxes upon the production from oil and gas wells produced and saved *"upon lands within Executive order Indian reservations."* That statute imposes one restriction only, i.e., that such taxes may not become a lien against Indian lands or property. The statute reads in full as follows:

§ 398c. Same; taxes

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Tribe and the Secretary of the Interior contend that 25 U.S.C.'s § 398c. does not pertain or control. They argue, first, that Tribe, as an element of its sovereign status, is empowered to enact and enforce its severance tax ordinance and, second, that the Congressional enactment on May 11, 1938, of 25 U.S.C.A. § 396a. specifically governs the subject leases (and production therefrom) and does not permit state taxation of oil and gas

produced within the Tribe's reservation. That statute reads as follows:

> § 396a. Leases of unallotted lands for mining purposes; duration of leases.
>
> On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198 § 1, 52 Stat. 437.

I cannot accept the contentions of Tribe and the Secretary, with full recognition of the rule that limitations on tribal self-government cannot be implied from a statute or treaty but must be *expressly* stated or otherwise made clear from surrounding circumstances and legislative history. *Bryan* v. *Itasca County, Minnesota, supra; Morton* v. *Mancari, supra.* My review of the legislative history of 25 U.S.C.A. 398(c) convinces me that the Congress did intend to grant States and local authorities the *exclusive* authority to tax non-Indian oil and gas lessees on production realized from their oil and gas operations conducted on Executive order Indian reservation lands. It has been held that Indian tribes are not "states". *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe, supra.* The Congressional discussions and debates relating to this legislation concentrated on the fact that Executive order reservation lands were not in the same category as those lands set aside under treaty to a tribe which "gave up" or "surrendered" ancestral or aboriginal rights in exchange therefor, but were, instead, simply set aside as a "gratuity" to the tribes from the United States. In the sense of the "balancing of interests" process, the Congress compromised the competing interests of the States and the tribes by authorizing the tribes to

retain all of the royalties paid under the operating leases and the States to impose taxes on the production of oil and gas. (H. Rept. No. 1791, 69th Cong., 2nd Sess., 69 Cong. Rec. 4580 (1927)). *See also:* (S.B. 876, 68th Cong., 2nd Sess., 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2234 (1925); 67 Cong. Rec. 10915 (1926).

I would reject Appellants' argument that the 1938 enactment of the Indian Mineral Leasing Act, 25 U.S.C.A. § 396(a), *et seq.*, repeals 25 U.S.C.A. 398(c). Although cognizant that statutes enacted for the benefit of the dependent Indian tribes are to be liberally construed and that doubtful expressions are to be resolved in favor of the Indians, *Morton* v. *Mancari, supra*, I would hold that because nothing in the Mineral Leasing Act of 1938 speaks to the subject of taxation of oil and gas produced from Indian lands and certainly nothing relating to Executive order reservation lands, there is lacking that required "clear intention" of provisions contained in a general statute necessary to effect repeal of or nullify the express terms of a specific statute, (25 U.S.C.A., 398c.), regardless of the priority of enactment. *Morton* v. *Mancari, supra; Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800 (1976); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Jicarilla Apache Tribe* v. *United States, supra; Glover Construction Company* v. *Andrus*, 591 F.2d 554 (10th Cir. 1979); Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05. Statutes must be construed as intended by the drafters when enacted in the light of conditions as they existed. *United States* v. *Stewart*, 311 U.S. 60 (1940).

In addition to reliance on repeal by implication of 25 U.S.C.A. § 398c. by enactment of 25 U.S.C.A. § 396(a), *et seq.*, Tribe further relies on the authority of the Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. §§ 476-477.

In accordance with the Indian Reorganization Act, Tribe adopted a revised Constitution on December 23, 1968, subsequently approved by the Undersecretary of the Interior. The

revised Constitution organized the tribal government into the tripartite departments of legislative, executive and judicial. The principal governing body is the tribal council consisting of elected members of the Tribe. Pertinent portions of the Tribe's revised Constitution are:

Article XI, Section 1 provides:

> The *inherent powers* of the Jicarilla Apache Tribe, *including* those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. [Emphasis supplied].

Subparagraph (e) of Section 1, Article 10, provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-menbers of the tribe doing business on the reservation.

Section 2 of Article 10 establishes the procedures for approval of tribal ordinances, which, in substance, provides that ordinances enacted be presented to the Superintendent, Bureau of Indian Affairs, Jicarilla Apache Agency, within ten days after approval by the Council, and that the Superintendent shall within ten days following receipt by him, transmit it to the Secretary of the Interior with his recommendation. The enactment becomes effective when approved by the Secretary, or if he does not act within 120 days following submittal to him. It was under authority thereof that the tribal council of Tribe on July 9, 1976, enacted its Oil and Gas Severance Tax Ordinance and further enacted a Severance Tax Permanent Fund Ordinance. These ordinances were subsequently approved by the Secretary of the Interior's delegate. The Tribal Severance Tax is expressly imposed on "any oil and natural gas severed, saved and removed

from Tribal lands". The *measure* of the tax is 5 cents per million BTU of gas and 29 cents per barrel of crude oil or condensate produced on the Reservation and *"sold or transported off the reservation"*. All oil, gas or condensate representing [reserved] royalty gas "taken by the Tribe in kind and used by the Tribe", *is exempt from the tax.*

Tribe does not — and cannot — point to any specific language in the Indian Reorganization Act of 1934 authorizing or empowering it to tax. In lieu of any such specific, clear language, Tribe relies upon (a) the stated purpose of the Act, i.e., freedom to organize for purposes of self-government and economic enterprise, and (b) an opinion rendered by the Solicitor to the Secretary of the Interior in 1934, identified as 55 I.D. 14, setting forth the purported intentions of Congress in enacting Section 16 of the Act. The opinion reads in part as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.
>
> * * *
>
> I conclude that under Section 16 of the Wheeler-Howard Act (Public No. 383, 73rd Congress) the "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
>
> * * *
>
> 5. To levy dues, fees, or taxes upon the members of the tribe and upon non-members residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

Tribe contends that the Solicitor's opinion, rendered the same year the Act became effective, is the "best indication of Congressional intent available", citing to *Squire* v. *Capoeman*, 351 U.S. 1 (1956). [Brief of Tribe, In Chief, p. 24]. A careful examination of the exact language employed by the Court in *Squire* v. *Capoeman, supra,* is simply that "These relatively contemporaneous official and unofficial writings are entitled to consideration." 351 U.S. at p. 9. I have considered them and find them wanting.

The only express language contained in the 1934 Act vesting rights and powers in a tribe or its tribal council, if organized under the terms of the Act is: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.* 25 U.S.C.A. § 476. The only conceivable language expressed in the § 476, *supra,* which the Solicitor's Opinion 55 I.D. 14 could have relied upon to "make the case" is that authorizing the various Indian tribes to organize under the Act "for its common welfare" and to adopt an appropriate constitution and bylaws". Any reliance thereon, as support of Tribe's contention that the Act effectively repealed 25 U.S.C. § 398c., *supra,* is misplaced.

My interpretation of the interplay between these conflicting contentions is, I believe, in accord with a detailed analysis of a similar conflict set forth in *Fort Mojave Tribe* v. *San Bernardino County,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1976). In that case, California exercised civil and criminal jurisdiction over Indian country within its borders [but specifically exempted taxation of any real or personal property belonging to any Indian or Indian Tribe] authorized under 28 U.S.C. § 1360(b). The court pertinently observed:

While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect the legal incidence of the tax clearly falls on the lessee[3] The lessor will never be personally liable for any delinquent taxes arising under this taxing statute . . . Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest. Similarly, the lease, apart from the lessor's reversionary interest, even if considered an asset of the tribe, is not directly encumbered simply because the amount of the tax is determined by the value of the leasehold. Whatever may be the scope of the indirect burden placed on the lessor's interest in this case, we hold that it is not sufficient to constitute an encumbrance of an "interest in land or other tribal asset."

Our conclusion is buttressed by the Supreme Court's decision in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L.Ed.2d 114 (1973). There the Court relying on the statement that section 476 of the Act [The Indian Reorganization Act of 1934] was designed to encourage tribal enterprises "to enter the white world on a footing of equal competition," 78 Cong.Rec. 11732, found that traditional tax immunities had neither been expanded nor reduced by the Act. *Mescalero, supra* at 153-54 n.9, 93 S.Ct. 1267. Because the court would not imply tax exemptions absent clear statutory guidelines it upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundries of their reservation. We *follow that lead here and refuse to find that the Act created a tax exemption for non-Indian lessees of Indian land. Congress has given no clear indication that such a result was desired. When such a signal is given, the state and local governments must retreat.*

* * *

Thus, we see that neither the Act nor PL-280 evidences a Congressional intent to preclude the taxation that is being challenged here. However, we cannot say that PL-280 directly authorizes such taxation. *Bryan* v. *Itasca County,*

supra, forecloses the possibility of such a statement by specifically holding that the PL-280 grant of civil jurisdiction only confers jurisdiction over civil causes of action involving Indians. It is not a general grant of regulatory and taxing power over Indians. This is not, however, fatal to the state's cause. Although *McClanahan, supra,* held that, in the absence of Congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with "exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan, supra* at 411 U.S. 168, 93 S.Ct. at 1260. When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. *McClanahan, supra* at 179, 93 S.Ct. 1257. Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. . . *To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question.* [Footnote omitted]. [Emphasis supplied].

543 F.2d at pp. 1256, 1257.

I observe that in the case at bar a holding that the New Mexico State taxes levied against the proceeds of oil and gas produced by lessee Operators from Tribe's Reservation lands are valid based upon the express Congressional "signal" authorizing same, i.e., 25 U.S.C. § 398(c), avoids any risk of permitting its imposition absent such clear Congressional consent. The Congress has expressly provided that the taxing laws of the various states extend over and apply to proceeds realized by non-Indian Operators from mineral exploration conducted on Executive Order Reservation lands. It is this power the court recognized in *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685 (1965).

In its Reply Brief and Additional Brief filed prior to oral argument, Tribe relies upon the Natural Gas Act of 1978, 15 U.S.C. §§ 3301, *et seq.*, as express Congressional recognition of tribal authority to impose severance taxes on natural gas. 15 U.S.C. § 3320(c) defines, for purposes of the Act, "State Severance Tax" as any "severance production, or similar tax . . . imposed on the production of natural gas . . . by any State or Indian Tribe." Tribe acknowledges that the conference report statement clearly shows that the Congressional conferees did not intend thereby to prejudge the outcome of cases then on appeal to this Court respecting the power of Indian tribes to impose taxes on non-Indians engaged in business activities on Indian reservations. In any event, I would hold that nothing in the language of the Natural Gas Act of 1978 can be interpreted as a Congressional grant of power to Indian tribes to enact and levy tribal severance taxes. The language is not, either expressly or impliedly, an affirmative grant of such power of taxation to Indian tribes.

III.

I would hold that the District Court did not err in concluding that the Tribe's Severance Tax levied only against oil, gas or condensate produced on the Reservation and sold or transported off the Reservation is an unlawful multiple burden on and discriminatory against interstate commerce.

Tribe and Secretary contend that the severance tax ordinance is not in conflict with the commerce clause because the precise "triggering" event here is entirely "local" in nature, i.e., the tax is imposed on oil and gas when severed, saved and removed from tribal lands. From thence, it is contended that the eventual entry of oil and gas taxed locally upon severance from tribal property into interstate commerce outside of New Mexico does not thereby invalidate the tax. Thus, Tribe and Secretary, in effect, contend that the Tribe's tax is "insulated" by reason of the local nature of its application.

The record reflects that all of the gas provided by Appellee Marathon from Tribe reservation lands is sold in interstate commerce. [R., Vol. VI, p. 240]. Some sixty percent of the production realized by Appellee Amoco is sold in interstate commerce. [R., Vol. VI, p. 229]. Thus, inasmuch as the tax is not designed to apply until the oil and gas produced is "sold or transported off the reservation", I would hold that the incidence bears directly and discriminately against interstate commerce. *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 450 (1959); *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939); *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307 (1938). A tax imposed on local activity related to interstate commerce is valid only if the local activity is not such an integral part of interstate process, the flow of commerce, that it cannot realistically be separated from it. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). There a Texas tax on the occupation of "gathering gas", measured by the entire volume of gas "taken", as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, was held invalid under the Commerce Clause. The Commerce Clause is offended when, as here, the tax, by its very nature, makes interstate commerce bear more than its fair share. *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948).

The Supreme Court has consistently struck down state laws which discriminately benefit [or may discriminately benefit] local or intrastate commerce at the expense of out-of-state or interstate commerce. In *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) the Court held that the Commerce Clause protects the interstate market, and not particular firms from prohibitive regulations. Under this rationale, the Court observed

that a state law does not discriminate against interstate commerce if it leaves the in-state and out-of-state businesses participating in the market on an equal competitive footing. In relation to the instant case, those businesses engaged in exclusive *intrastate* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving in *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing.

In *Boston Stock Exchange* v. *State Tax Comm'n.*, 429 U.S. 318 (1977), the Supreme Court stated:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g., Freeman* v. *Hewit, supra*, at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.*, at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.* See also *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64 (1963); *Nippert* v. *Richmond*, 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908); *Guy* v. *Baltimore*, 100 U.S.

434, 443 (1880); *Wellon* v. *Missouri*, 91 U.S. 275 (1876). The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951).

429 U.S. at p. 329.

I would affirm the District Court.

ORDER,
COURT OF APPEALS FOR THE TENTH CIRCUIT
AMENDING OPINION AND DENYING REHEARING

PREVIOUS PAGE WAS BLANK

Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing, entered April 25, 1980.

MARCH TERM — April 25, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges.

No. 78-1154

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY AND GULF OIL CORPORATION,

Plaintiffs-Appellees,

VS.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendents Appellants,

MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,

Intervenors-Appellees.

No. 78-1251

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,

Plaintiffs-Appellees,

VS.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing filed by the appellees in the captioned cases.

Upon consideration whereof, it is ordered:

1. Page 6 of the opinion filed February 22, 1980, is recalled and vacated, and a substitute page 6 is published and inserted in its place.

2. The petition for rehearing is denied. Chief Judge Seth and Circuit Judge Barrett voted to grant rehearing. Circuit Judge Seymour, who was not a member of the Court at the time of submission, did not participate.

3. Jicarilla Apache Tribe is granted leave to file its verified bill of costs out of time. The Court has considered the objection to the bill of costs filed by appellees. The Clerk shall issue a statement of costs in favor of appellant Jicarilla Apache Tribe in the sum of $993.51.

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: Nos. 78-1154 and 78-1251, Merrion, et al, v. Jicarilla Apache Tribe, et al

Enclosed is a new page 6 to be substituted for page 6 in the original opinion, which was filed February 22, 1980.

Very truly yours,

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

HKP/dve

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. §702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe

[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

ORDERS,
SUPREME COURT OF THE UNITED STATES
CONSOLIDATING 80-11 AND 80-15,
AND GRANTING CERTIORARI

Supreme Court of the United States

No. 80-11

J. GREGORY MERRION AND
ROBERT L. BAYLESS, ETC., ET AL.,
Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 6, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

The case is consolidated with No. 80-15 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart took no part in the consideration or decision of this petition.

Supreme Court of the United States

No. 80-15

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY,

Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 6, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

The case is consolidated with No. 80-11 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart took no part in the consideration or decision.